8-5-2016

Kunz v. Nield, Inc. Respondent's Brief Dckt. 43724

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiff- Appellant v. NIELD, INC., an Idaho Corporation, dba INSURANCE DESIGNERS Defendant- Respondent	)	Supreme Court Docket No. 43724-2015

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bear Lake County.

Honorable Mitchell Brown, District Judge presiding.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is a declaratory judgment action filed by Bret Kunz ("B. Kunz"), an insurance agent, to interpret a written contract for services that he has with Nield, Inc., an insurance agency business.[1] The parties dispute whether the express terms of their contract create a legal duty for Nield, Inc. to provide B. Kunz with profit sharing payments[2] that Nield, Inc. receives from insurance companies.

The business relationship between B. Kunz and Nield, Inc. began in 1996 when the parties entered into a written contract for Bret Kunz to act as a subcontractor for Nield, Inc., under his brother Michael Kunz ("M. Kunz"). Nield, Inc. and M. Kunz had a contract substantially similar to the one between Nield, Inc. and B. Kunz, except Nield, Inc. and M. Kunz were 50/50 co-owners of the book-of-business M. Kunz placed with Nield, Inc.

When M. Kunz died in July 2008, B. Kunz decided to purchase M. Kunz's half of the book-of-business. B. Kunz also desired to have a new contract with Nield, Inc. that would give him the same ownership interest in the book-of-business that his brother, M. Kunz, had in his contract. Nield, Inc. was agreeable to B. Kunz's request, so B. Kunz and Nield, Inc. entered into a new contract on or around November 2008 for the purpose of adding the ownership clause into the contract.

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[1] The judgment appealed from is only a partial judgment. Other claims below have not been certified as final for appeal.

[2] Throughout this brief, Nield, Inc. uses "profit sharing" as a term to include "bonus commissions, contingent commissions, or profit sharing," unless the context clearly indicates otherwise. See R. 504, fn. 8.

The question that the District Court was tasked to address below was whether it was reasonable for B. Kunz to ascribe new meaning to language contained in the 2009 contract that would provide a legal duty for Nield, Inc. to provide profit sharing. The District Court correctly disagreed with B. Kunzes' interpretation, and decided that profit sharing was not contemplated by the new contract because:

1. The only purpose of entering into the 2009 Contract ("Agent Contract") was to create a new contract to include an ownership clause for the book of business;
2. The exact same contract language in dispute is also contained in the 1996 Contract ("1996 Contract") between B. Kunz and Nield, Inc.;
3. For the thirteen (13) years that the parties operated under the 1996 Contract, B. Kunz did not have an expectation that the 1996 Contract provided a duty for profit sharing; and,
4. B. Kunz's suggested interpretation of the term "commissions" conflicts with other sections of the Agent Contract.

B. Kunz now appeals.

II. PROCEDURAL HISTORY

It is appropriate to add to B. Kunz's *Appellant's Brief* section on the Procedural History that after the Kunzes filed their November 12, 2015 Amended Notice of Appeal, this Court issued an Order Conditionally Dismissing Appeal on December 8, 2015, stating that the Trial Court's November 5, 2015 Declaratory Judgment and Rule 54(b) Certificate was not a final judgment. This Court further ordered that the Kunzes were allowed additional time to obtain a final judgment from the trial court or file a response with this Court indicating the reasons why

the appeal shouldn't be dismissed. R. 744. The District Court *sua sponte*, and outside the presence of the parties, contacted the Idaho Supreme Court regarding the November 5, 2015 Declaratory Judgment and Rule 54(b) Certificate. Tr. Hearing Date 1/21/16, p. 16, L. 14 - p. 17, L. 4. After discussions with the Idaho Supreme Court, the District Court entered a subsequent Declaratory Judgment and Rule 54(b) Certificate on December 22, 2015. R. 746-748. B. Kunz then filed a *Second Amended Notice of Appeal* on December 28, 2015. R. 749-752.

III. STATEMENT OF THE FACTS

B. Kunz reproduced the Trial Court's Findings of Facts from its August 31, 2015 Findings of Facts and Conclusions of Law and Memorandum Decision and Order in their entirety, and Nield, Inc. does not dispute those are the facts as determined by the Trial Court. However, Nield, Inc. adds that some of the Trial Court's Conclusions of Law in its August 31, 2015 Findings of Facts and Conclusions of Law and Memorandum Decision and Order are actually findings of fact, and should be included here:

1. There was little or no negotiation between the parties or their representatives regarding their business relationship at the time the Agent Contract was entered. R. 518, ¶23.
2. There was little discussion regarding the details of the Agent Contract and it was obvious from the express language of the Agent Contract, course of dealings, and trial testimony that the parties had the following understanding:
    a. B. Kunz would receive 80% of commissions related to new business or policies sold;

b. B. Kunz would receive 80% of commissions associated with renewals relative to his existing book of business; and,

c. B. Kunz would own 50% of his book of business and Nield, Inc. would own 50%.

R. 518, ¶24.

3. Besides profit sharing payments received from Gem State Insurance Company, there was no meeting of the minds between the parties on any agreement to pay profit sharing percentage splits, and Nield, Inc. never agreed by express terms or course of dealings to pay B. Kunz 80% of the profit sharing attributable to Gem State Insurance. Also, the course of dealings by the parties only allowed for the 50/50 split of the amount paid to Nield, Inc. and accepted by B. Kunz. R. 524, ¶29.
4. The parties intended to limit the meaning of "commissions" to a "percentage of premium paid to agents by insurance companies for the sale of policies" for both new business and existing renewals. R. 522-523, ¶35.
5. The language in B. Kunz' 1996 Contract and Agent Contract is virtually identical; Paragraph 6 of the two contracts is substantively identical; and, Paragraph 7 is virtually identical. R. 523, ¶36.
6. Under B. Kunz's 1996 Contract he did not expect to receive profit sharing or contingent commissions. R. 523, ¶36.
7. The purpose of entering into the Agent Contract was to include an ownership clause similar to the one contained in the Agent Contract between M. Kunz and Nield, Inc. R. 523, ¶36.

8. The course of dealings between B. Kunz and Nield, Inc. reflect that commissions were paid monthly on "initial commissions" earned from premiums received from new policies and business and "residual commissions" from premiums received from existing renewed policies, and that paragraphs 6 and 7 of the Agent Contract are limited to commissions capable of payment monthly and not annually. R. 523-524, ¶37.
9. B. Kunz's definition of "commission" is unreasonable. R. 524, ¶38.
10. The parties do not have an "individual agreement" outside of and separate to the Agent Contract, and their Agent Contract is not intended to set out terms as to profit sharing or contingent commissions connected with Acuity, Alliance, and Allied. R. 524, ¶39.
11. There is no agreement between the parties that requires Nield, Inc. to pay B. Kunz a 50/50 split, an 80/20 split, or any amount of split connected with contingent bonuses paid from Acuity, Alliance, and Allied. Any payments labeled as "profit sharing" were arbitrary and gratuitous. R. 524, ¶40.

ADDITIONAL ISSUES PRESENTED ON APPEAL

I. **WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THE CONTRACT WAS AMBIGUOUS**

II. **WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT I.R.C.P. 41(b) IS INAPPLICABLE TO DECLARATORY JUDGMENT ACTIONS**

ATTORNEY FEES ON APPEAL

Nield, Inc. requests its costs and attorney fees incurred in defending this appeal pursuant to Idaho Code §§ 10-1210, 12-120(1) & (3), 12-121; and I.A.R. 11.2 and 40.

ARGUMENT

Nield, Inc. will address each of the Kunzes' six (6) issues presented on appeal[3] in the order raised in the *Appellant's Brief*, before discussing the two (2) additional issues raised on appeal and the matter of attorney fees.[4]

STANDARD OF REVIEW

When an appellate court considers an appeal from a district court sitting as the fact finder, it does so through an abuse-of-discretion lens; that is, the appellate court examines whether the trial court (1) rightly perceived the issues as ones of discretion; (2) acted within the outer boundaries of that discretion and appropriately applied the legal principles to the facts found; and (3) reached its decision through an exercise of reason. In conducting the review, the appellate court liberally construes the district court's findings in favor of the judgment. A district court's findings of fact will not be disturbed unless they are clearly erroneous. A trial court's findings of fact are not clearly erroneous if they are supported by substantial and competent, though conflicting, evidence. The appellate court will not substitute its view of the facts for that of the trial court. Questions of credibility and the weight of the evidence are matters uniquely within the province of the trial court. *Weitz v. Green*, 148 Idaho 851, 857, 230 P.3d 743, 749 (2010) (citations omitted).

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[3] The Kunzes' first issue on appeal contained in their Second Amended Notice of Appeal was "Did the Court err in Bifurcating these Proceedings?" R. 750 ¶ 3(I). By failing to include this issue in their brief, the Kunzes have waived this issue on appeal. I.A.R. 35(a)(4); *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525, 272 P.3d 491, 497 (2012).

[4] The *Appellant's Brief* is littered with *ad hominem* diatribe against Nield, Inc., specifically its President, B. Nield. Rather than responding to each irrelevant and improper aspersion, this *Respondent's Brief* focuses on the issues germane to the appeal. Suffice it to say though that Nield, Inc. disagrees vehemently with the Kunzes' animadversions.

I. THE DISTRICT COURT'S INTERPRETATION OF THE TERM "COMMISSION" IS BASED ON SUBSTANTIAL EVIDENCE

It appears that the Kunzes believe that it was in error for the District Court to call certain payments "a gratuitous bonus," when they were labeled "profit sharing" in extrinsic evidence. *Appellant's Brief*, p. 18; R. 525 ¶40. The Kunzes reach an illogical presumption that the only way the District Court could have concluded these "profit sharing" payments were a "gratuitous bonus" was by accepting Bryan Nield's ("B. Nield") "subjective, undisclosed intent," mistakenly applying contract principles of construction contained in *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 167 P.3d 748 (2006) and *Beus v. Beus*, 151 Idaho 235, 254 P.3d 1231 (2011) to support their position.

A. The Kunzes Misapply the Objective Law of Contract Interpretation

In interpreting contracts, courts are to ascertain the meaning and mutual intent of the parties at the time the contract is made by looking to the language used in the contract. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 688, 365 P.3d 1033, 1042 (2016). *Beus, Bosen,* and other Idaho appellate court decisions have recognized the objective law of contract interpretation. *Beus,* 151 Idaho at 239, 254 P.3d at 1234 (2011); *Bosen*, 144 Idaho at 614, 167 P.3d at 751; *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho 709, 720, 330 P.3d 1067, 1078 (2014). The objective law of contract is a law of contract interpretation that mandates that a court is to give force and effect to the objective meaning of the words used in the contract, without considering what a party thought the language meant or what a party actually intended for the terms to mean. *Bosen*, 144 Idaho at

614, 167 P.3d at751. The Maryland Court of Appeals provides helpful explanation on the subject:

> [A court is to] determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean.

Spacesaver Systems, Inc. v. Adam, 98 A.3d 264, 268-69, (Md. 2014) (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 492 A.2d 1306, 1310 (Md. 1985).

The Kunzes misapply the objective law of contract interpretation.[5] They take issue with extraneous documents where payments are labeled as "profit sharing," R.Ex. 720 (Ex. 202), R.Ex.192 (Exh.204), R.Ex.216 (Exh.205), and argue that the Court erred in construing these payments as "gratuitous bonuses," when they were never referred to as such, prior to litigation. *Appellant's Brief*, p. 17-18.

The *Beus* and *Bosen* cases cited as authority by the Kunzes are distinguishable. Those cases dealt with application of the objective law of contract interpretation to the language contained in a lease and contract at issue and whether or not it was reasonable, not language that was used in extraneous evidence.

[5] A correct application of the objective law of contract interpretation is the rejection of B. Kunz's subjective, undisclosed interpretation of the term "commission" in paragraph 7, where this term was used in the 1996 Contract, where he did not have any reasonable expectation of profit sharing. R. 502 ¶ 7. B. Kunz failed to discuss profit sharing prior to entering into the Agent Contract. Tr. Vol. I p. 144, L. 18-22.

The Kunzes fail to cite anything in the record that shows the District Court found the Agent Contract unambiguous but gave meaning to Nield, Inc.'s "subjective intent" of contract terms anyway. In order for this Court to accept the Kunzes' position, it would require an astonishingly novel application of the objective law of contract interpretation. The Kunzes fail to cite any authority that supports extending the objective law of contract interpretation to extrinsic written communication in the manner suggested, and this Court should therefore not consider this issue on appeal. *Hopper v. Swinnerton*, 155 Idaho 801, 806, 317 P.3d 698, 703 (2013) (Where an appellant fails to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the appellate court).

If this Court decides to consider this issue, it can determine that the Kunzes have failed to show that the objective law of contract interpretation is applicable to this matter. This Court can easily determine that the District Court did not err on this issue.

B. The Argument that the District Court Accepted the Subjective Undisclosed Intent of Nield, Inc. Applies the Logical Fallacy of False Cause

The Kunzes' presumption that the only way the District Court could have concluded that payments were a "gratuitous bonus" was through accepting Nield, Inc.'s "subjective, undisclosed intent" is *non causa pro causa*. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997). The Kunzes overlook the reasonable approach in how the District Court reached its conclusion.

C. The District Court Reached the Conclusion that there is no Contractual Duty for "Profit Sharing" through an Exercise of Reason

The District Court began by determining that the contract term "commission" in paragraph 7 was ambiguous. R. 516-17, ¶¶ 17-20.[6] The District Court recognized the law in *Beus* that ambiguous terms are interpreted by "looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." *Beus*, 151 Idaho at 238, 254 P.3d at 1234; R. 517, ¶ 21.

The District Court found that the intention of the word "commission" is a percentage of premium paid to agents by insurance companies for the sale of policies both new business and existing renewals. R. 522-23, ¶ 35. In arriving at its conclusion of the interpretation of "commission," the Court relied upon the fact that (1) the language of paragraph 6 in B. Kunz's 1996 Contract, R.Ex. 7 (Ex. 102), and Agent Contract, R.Ex. 18 (Ex. 105) are substantively identical; (2) the language of paragraph 7 in the 1996 Contract and Agent Contract are virtually identical; (3) the purpose of the Agent Contract was to create a "new contract that would include an ownership" clause like M. Kunz's contract with Nield, Inc. (4) B. Kunz's admission that under the 1996 Contract, he did not receive and did not expect to receive profit sharing; (5) other paragraphs in the contract refer to the term "commissions" in the context of monthly payments and the contract does not distinguish its meaning or usage from the use of "commission" in paragraph 7; (6) the parties' conduct reflects that commissions were paid monthly on "initial

[6] Nield, Inc. disagrees with this conclusion. See Issue VII, herein.

commissions" and "residual commissions"; and (7) "contingent commissions" are only paid annually. R. 523 ¶ 36.

Having found that the intention of the parties was that the meaning of "commission" had a more restrictive meaning, the District Court concluded that the contract did not contain a duty to pay "profit sharing." R. 524, ¶ 39. The District Court rejected B. Kunz's much broader meaning of the term "commission." R. 522 ¶ 34 and 524 ¶ 38.

The District Court's mentioning that the payments were a result of "gratuitous bonuses" was simply an explanation of the conclusion that it had reached. R. 524 ¶ 40. It certainly was not, as the Kunzes contend, a tendentious acceptance of Nield, Inc.'s "subjective, undisclosed intent."

The Kunzes fail to show that the District Court abused its discretion. The objective law of contracts does not apply in this case. The Kunzes have adopted the logical fallacy of false cause for their position that the only way the District Court could have arrived at the conclusion that payments were a "gratuitous bonus" was accepting the subjective intent of B. Nield. The District Court found through an exercise of reason based on substantial evidence that the contract does not contain a legal duty for profit sharing.

II. THE DISTRICT COURT DID NOT ERR IN FAILING TO GIVE UNDUE WEIGHT TO THE CONDUCT OF THE PARTIES

It appears that the Kunzes' argument on this issue is that the District Court erred in using the parties' conduct as a basis for interpreting an implied in fact contract or side agreement for profit sharing and should have given the conduct of the parties more weight in interpreting the term "commission." The Kunzes are correct that it was improper for the District Court to

conclude that an implied in fact side agreement existed; however, the District Court did not abuse its discretion in interpreting the meaning of the term "commission."

A. The District Court Erred in Concluding an Implied in Fact Contract Existed

No doubt, the Kunzes' frustration with the District Court's finding of a "side agreement" is premised upon the Court's finding being completely contrary to the Kunzes' theory of the case.[7] B. Kunz's position all along has been that his Agent Contract is the source for his right to profit sharing and that his appropriate share therefrom is eighty percent (80%). R. 8 ¶ 7. He confirmed this singular legal theory at trial and this same argument continues to be his position on appeal. *Appellant's Brief* p. 29 ("Profit sharing is, at a minimum, a derivative of his Agent Agreement, and not some side agreement.").[8]

Prior to trial, Nield, Inc. filed a Motion in Limine, raising the issue that the Kunzes' Trial Brief alleged facts and theories not contained in the pleadings. R. 397-98, ¶ 7. The District Court heard argument on the Motion in Limine on the morning of the first day of trial. During argument on the motion, Nield, Inc. expressed its concern that the Kunzes appeared to be raising the issue of an implied in fact contract at the eleventh hour. Tr. Vol. I, p. 4, L. 25 - p. 5, L. 3. The District Court determined that it was proper for Nield, Inc. to raise this issue in light of the information contained in the Kunzes' Pretrial Brief. Tr. Vol. I, p. 10, L. 3-8. The District Court's questioning at the hearing shows that the Kunzes were not asserting an implied in fact contract:

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[7] *In re Stone's Estate*, 78 Idaho 632, 639, 308 P.2d 597, 601 (1957) (An appellant cannot complaint of error favorable to him.).

[8] See also *Appellant's Brief*, p. 33-34, discussing how it was erroneous for the District Court to conclude that there was an implied in fact contract between the parties.

> THE COURT: So you don't believe you're asserting an implied in fact contract?
>
> MR. WUTHRICH: No. I think that case was probably a U.C.C. case. That's probably why it talked in those terms. I was just pointing out that a course of performance is something that the courts look to for interpretation of contracts.

Tr. Vol. I, p. 11, L. 8-10. After hearing from both sides on the matter, the District Court ruled:

> The court will consider extrinsic evidence for the purpose of determining what the parties intent is, what the course of dealings may have been to assist with the interpretation and understanding of that contract as it relates to any ambiguities associated with that contract. **I will not consider the same in the light of a breach of an implied in fact type of contract or the establishment of an implied in fact contract**.

Tr. Vol. I, p. 13, L. 25 – p. 14, L.8 (emphasis added).

Even though it seemed clear at the beginning of trial what limited purpose the extrinsic evidence was being offered for, the District Court ignored the parties' understanding and its own ruling when it entered its Findings of Fact, Conclusions of Law and Memorandum Decision and Order. R.519 ¶ 28. After considering certain extrinsic evidence as it related to the parties' conduct from the years 2008 through 2012, R.518 ¶¶ 25-27, the District Court concluded that B. Kunz had established a "course of dealing" sufficient to establish a separate agreement from the Agent Contract. R. 519 ¶ 28. The Court's determination that there was a "separate agreement" was clearly based on an implied in fact legal theory. *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 707, 52 P.3d 848, 852 (2002) (An implied in fact contract exists where there is no express agreement but the conduct of the parties implies an agreement from which an obligation in contract exists.).

The District Court erred in making findings concerning this separate, implied in fact agreement, because this legal theory was not pled and was specifically understood by the parties to be a non-issue at trial. *Wilson v. Wilson*, 6 Idaho 597, 57 P. 708, 711 (1899) (A district court's findings must be responsive to and within the issues created by the pleadings.); Accord *Cameron's Run, LLP v. Frohock*, 9 A.3d 664, 667 (Vt. 2010) ("Generally, all parties are entitled to be spared having their litigation unexpectedly decided on the basis of issues and doctrines outside of the understood course and direction of the case as pleaded and tried." (Citations omitted)).

Even though the District Court erred in considering an implied in fact contract theory, Nield, Inc. recognizes that because judgment was ultimately entered in its favor, the District Court's error on this issue is probably harmless.[9] *Fonseca v. Corral Agriculture, Inc.*, 156 Idaho 142, 149, 321 P.3d 692, 699 (2014). In addition, the Kunzes fail to show how the District Courts finding of an implied in fat contract is prejudicial. *Clark v. Truss*, 142 Idaho 404, 409, 128 P.3d 941, 946 (2006) ("The appellant bears the burden of showing prejudicial error on appeal").

B. The District Court Did Not Abuse Its Discretion By Interpreting The Meaning Of "Commission"

In claiming that the District Court erred in its factual interpretation of the term "commissions,"[10] the Kunzes fail to understand that evidence of the parties' conduct and dealings is just one of several factors that a Court considers when interpreting a contract. *Beus v.*

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[9] It is possible that this issue could be prejudicial to Nield, Inc. should this appellate court decline to affirm the District Court or reverse any portion of its Judgment. Nield, Inc. failed to raise any defenses for an implied in fact contract theory.

[10] Although contained in the District Court's Conclusions of Law Section, this was most likely a finding of fact since the Court employed the *Beus* factors in arriving at the intent.

Beus, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011). The District Court appropriately applied the *Beus* factors to the facts of the case when it made its factual finding regarding the interpretation of the term "commission." *Weitz v. Green*, 148 Idaho 851, 857, 230 P.3d 743, 749 (2010) (An appellate court liberally construes the district court's findings in favor of the judgment and will not disturb the trial courts findings of fact unless they are clearly erroneous.). This Court has repeatedly held that it "will not substitute its view of the facts for that of the trial court," and questions of "the weight of the evidence are matters uniquely within the province of the trial court." *Id.*

The contention that the District Court "ignored its own factual findings" or "misconstrued the evidence" is without merit. *Browning v. Ringel*, 134 Idaho 6, 14, 995 P.2d 351, 359 (2000) ("[T]he trial court is not required to provide a lengthy discussion on every single piece of evidence and every specific factual issue involved in the case."). The District Court's findings on the interpretation of the meaning of "commission" are "clear, coherent and complete." *Id.* It was not necessary for the District Court to provide an extensive discussion of the evidence and testimony. *Id.* ("A decision between the positions of two litigants necessarily rejects contentions made by one or the other. The trial court's failure to discuss each party's contentions does not make the findings inadequate or suggest that the court failed to understand the propositions.").

In contending that the District Court erred in its interpretation of the term commission, the Kunzes fail to show how that finding is not supported by substantial and competent evidence. *Weitz v. Green*, 148 Idaho 851, 857, 230 P.3d 743, 749 (2010) (Appellate court will not disturb a district court's findings of fact unless they are clearly erroneous.). Instead, the Kunzes choose to

make inadequate arguments that the District Court's findings on the interpretation of the term "commission" conflicts with extrinsic evidence regarding the conduct of Nield, Inc. *Id.* (A court's findings of fact are not clearly erroneous if they are supported by substantial and competent, **though conflicting,** evidence (emphasis added)). The District Court's interpretation of the term "commission" is supported by substantial and competent evidence. R. 522 ¶ 35.

The Kunzes have not shown that the District Court's finding of fact on the interpretation of the term "commission" lacks support of substantial and competent evidence. The Kunzes' position on this point of their appeal is nonsensical.

III. THE DISTRICT COURT CONSIDERED AND REJECTED THE "OTHER FUNCTIONS" LANGUAGE IN THE CONTRACT AS AN ALTERNATIVE BASIS FOR PROFIT SHARING

The issue raised by the Kunzes is whether the Court ignored or otherwise did not address paragraph 7 as a basis for profit sharing. This issue is absurd.

The District Court concluded that it could not find the contract "intended to set out terms and conditions associated with profit sharing or contingent commissions associated with Acuity, Alliance, and Allied." R. 524 ¶ 39. This finding shows that the Court considered the contract, including paragraph 7, but could not find any contractual duty for profit sharing. *Browning v. Ringel*, 134 Idaho 6, 10-11, 995 P.2d 351, 355-56 (2000) ("The findings of the trial court will be liberally construed to support a judgment or order. Consequently, if facts can be inferred from those set forth in the findings, 'such inferences will be deemed to have been drawn.'").

The District Court addressed the language in Paragraph 7, "Other functions based on commission split and individual agreement," in its Findings of Fact and Conclusions of Law and

concluded that "these phrases seem to **have no place within this document other than** to notify the reader and the parties that there are other unexpressed functions and individual agreements not discussed and/or outlined in the body of this document." R. 517 ¶ 20 (emphasis added). The District Court found that there was a limited purpose for this sentence in paragraph 7, which is to alert of the possibility of other outside agreements. The Kunzes' reading of paragraph 7 does not comport with the interpretation given by the District Court. This means that paragraph 7 cannot be a justifiable "alternative basis" for profit sharing.

The argument that the District Court simply "ignored" or "failed to consider" the language in paragraph 7 is without merit. The Kunzes fail to show a legitimate basis for how the District Court erred on this point.

IV. THERE WAS NO MUTUAL ASSENT ON THE DIVISION OF PROFIT SHARING

Another reason that the District Court erred in finding an implied in fact contract is lack of mutual assent, or failure of the parties to have a tacit understanding, as to the division of profit sharing. *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 708, 52 P.3d 848, 853 (2002) ("The implied-in-fact contract is grounded in the parties' agreement and tacit understanding."). The District Court's finding that there is an implied in fact contract as to Gem State profit sharing payments we based upon the conduct of the parties between 2008 through 2012. R. 520 ¶ 29. However, during this period, the parties disagreed on how to split the payment, an essential term of any contract,[11] and because mutual assent was lacking on this point, there could not have been

[11] *Lawrence v. Jones*, 124 Idaho 748, 751, 864 P.2d 194, 197 (Ct. App. 1993) (applying Black's Law Dictionary definition of essential to a contract) (An essential term is one that is indispensably necessary or important in the

a contract. *Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Ct. App. 2009) (There must be a meeting of the minds on the essential terms of the agreement).

The Kunzes suggest in their *Appellant's Brief*, p. 34 that the Court predicated the 50/50 split for the implied in fact contract on the ownership provision contained in ¶ 8 of the contract. However this is incorrect. The Court found the split based upon the conduct of the parties. R. 521 ¶ 29.

In order to accept the Kunzes' argument that the split for profit sharing should be at the commission rate, one must accept that the term "commission" in the contract includes profit sharing.[12] This is something the District Court declined to find. This Court can determine that the District Court did not abuse its discretion.

V. THE DISTRICT COURT DID NOT ERR IN FAILING TO CONSTRUE THE AGENT CONTRACT AGAINST NIELD, INC.

Construing contract language against the drafter is a rule of last resort. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152, fn. 4 (Ct. App. 1994) (citing 3 CORBIN ON CONTRACTS § 559, at 268 (1969); See *Luzar v. Western Sur. Co.*, 107 Idaho 693, 697, 692 P.2d 337, 341 (1984) ("If the court or jury is unable to determine the intent of the parties, then the ambiguity should be resolved against the party who used the ambiguity in drafting the contract."). The District Court went through the normal process of ascertaining the

highest degree.); See *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 155 Idaho 55, 63, 305 P.3d 499, 507 (2013) (A payment price, or defined calculation for a certain price, is considered a material term of a contract.).

[12] Nield, Inc. is left wondering what the Kunzes are referring to when they suggest that there are conflicting contractual provisions.

mutual intent of the parties at the time the contract was made by looking to the language of the agreement R. 520 ¶ 29 and considering the relevant extrinsic evidence R. 522 ¶¶ 35-36.

Through this process, the District Court was able to make a determination as to the intent of the parties. R. 520 ¶¶ 35-38. There was therefore no need to fall back on a rule of last resort and construe the contract language against the drafter.[13]

VI. THE KUNZES FAILED TO RAISE BELOW THE ISSUE OF WHETHER THE JUDGMENT APPEALED FROM SHOULD HAVE INCLUDED ADDITIONAL CLAIMS

An appellate court will not consider issues raised for the first time on appeal. *Unifund CCR, LLC v. Lowe*, 159 Idaho 750, 755, 367 P.3d 145, 150 (2016). The Kunzes did not raise below the issue of whether the Judgment and Rule 54(b) Certificate entered on December 22, 2015 ("December 22, 2015 Judgment"), R. 760, was deficient.

Additionally, the Kunzes' current argument on appeal is inconsistent with their prior position. Nield, Inc. made a Motion to Alter or Amend the Judgment, R. 765, and the Kunzes objected to "any amendment" to the December 22, 2015 Judgment. R. 782. At the hearing, counsel for the Kunzes specifically stated that the December 22, 2015 Judgment should be left alone. Tr. Hearing Date 1/21/16, p. 21 LL. 11-12. At that time the District Court made clear that the December 22, 2015 Judgment is a partial judgment that was certified as appealable under

[13] The issue of who was the drafter of the contract is immaterial because the District Court resolved the issue of interpretation of the contract without applying the rule of *contra proferentem*. However, it should be noted that the contract between B.Kunz and Nield Inc. was not a contract of adhesion or made on a "take-it-or-leave-it basis." *Federal Nat. Mortg. Ass'n v. Hafer*, 158 Idaho 694, 702-03, 351 P.3d 622, 630-31 (2015). The evidence showed that the contract was the product of at least some discussion. R. 503 ¶¶ 10-11, Tr. Vol I. 132 LL 16-18, Tr. Vol I. 33 LL 13-25. See *First Interstate Bank of Idaho v. Gill,* 108 Idaho 576, 577-78, 701 P.2d 196, 197-98 (1985) (no contract of adhesion when the contract at issue was a result of arms-length negotiation).

54(b) and that "[t]here are and continue to be unresolved claims." Tr. Hearing Date 1/21/16, p. 20 LL. 16-23.

Moreover, the Kunzes have failed to provide any legal authority supporting the assertion that the Court erred in failing to address additional claims in the December 22, 2015 Judgment, R. 760, and have therefore waived this issue on appeal. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1998) (A party waives an issue on appeal by failing to provide authority supporting its argument.). In fact, the Kunzes seem to recognize that their position on this issue is without merit. The Kunzes state, "This counsel recognizes that the declaratory judgment appealed from is interlocutory in nature, and only certified as final under Rule 54." *Appellant's Brief* p. 39.

The Kunzes' position that the District Court failed to enter judgment on other claims as part of its December 22, 2015 Judgment, R. 760, is without merit and inconsistent with I.R.C.P. 54. After this appeal is concluded, the District Court will resume jurisdiction and be required to enter judgment on all remaining claims. *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 868, 55 P.3d 304, 322 (2002) (There is no final judgment until a judgment is entered resolving all of the claims in the complaint.). The District Court did not err on this issue.

VII. THE DISTRICT COURT ERRED IN CONCLUDING THE CONTRACT WAS AMBIGUOUS

The Kunzes' maintain an unreasonable interpretation of the term "commission" in paragraph 6 and "Other functions based on commission split and individual agreement" found in paragraph 7 of the contract. Thus, this Court can conclude that the contract is unambiguous.

Brown v. Greenheart, 157 Idaho 156, 166, 355 P.3d 1, 11 (2014) ("Whether a contract is ambiguous is a question of law which may be freely reviewed by an appellate court."); *Potlatch Education Ass'n v. Potlatch School District No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (A contract term is ambiguous when there are two different reasonable interpretations.). In looking at the Agent contract as a whole, it is clear that the contract terms at issue are not susceptible to two reasonable interpretations. *Steel Farms v. Croft*, 154 Idaho 259, 266, 197 P.3d 222, 229 (2012) ("A court must look to the contract as a whole and give effect to every part thereof.").

"If the provisions of a contract are ambiguous, the interpretation of those provisions is a question of fact which focuses upon the intent of the parties." *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 750 (2006). Ambiguity may be either patent or latent. *Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2015). A contract phrase is patently ambiguous when there are two different reasonable interpretations or the language is nonsensical. *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832, 291 P.3d 1027, 1031 (2012). A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. *Rangen,* 159 Idaho at 807, 367 P.3d at 202. Idaho law permits first, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement. *Id.* A contract is not rendered ambiguous on its face because one of the parties thought that the words used had some meaning that differed from the ordinary meaning of these words. *Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 63, 175 P.3d 748, 752 (2007).

"The relevant inquiry in determining whether a contract is ambiguous is the meaning intended by the parties at the time of contracting, not at some future time." *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315, 246 P.3d 961, 968 (2010).

A. "Other Functions based upon on commission split and individual agreement" is not Ambiguous

The District Court reached the erroneous legal conclusion that the last sentence of Paragraph 6 is ambiguous. R. 517 ¶ 19. This conclusion was based upon the contract not defining what "other functions" means or identifying what "individual agreements" relates to. R. 517 ¶ 20. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) (Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used.).

Even though the District Court concluded this sentence was ambiguous, the District Court gave these words their ordinary and common meaning and determined that this sentence's purpose is "to notify the reader and the parties that there are other unexpressed functions and individual agreements not discussed and/or outline in the body of this document." R. 517 ¶ 20.

B. Kunz's claim that "other functions" could be inclusive of profit sharing is inconsistent with the language in the contract. "Other functions" is based upon the commission split and individual agreement. No individual agreement is set forth as a provision in the contract and the language suggests that any "other functions" would be a separate agreement from the contract itself. Because it is contemplated that "other functions" will be agreed to in a separate

"individual agreement", apart from the contract, the suggestion that the language "other functions" is inclusive of a duty to pay profit sharing is unreasonable.

The interpretation that B. Kunz gives to "other functions" does not fit with the rest of the section and his interpretation of this language is therefore inconsistent. This Court can determine as a matter of law that paragraph 6 is unambiguous and does not include a duty for profit sharing.

B. The Term "Commission" is not Ambiguous

The District Court allowed extrinsic evidence to be admitted in order to determine whether the term "commission" is ambiguous. The conclusion reached was that "commission" is latently ambiguous because it could be read broadly to include "contingent commissions" based upon its meaning in the insurance industry. R. 522 ¶ 35.

However, the Court fell short in its analysis of whether the term "commission" as used in the contract is actually ambiguous. The Court only seemed to determine whether the term "commission" was susceptible to two different interpretations, rather than analyzing whether B. Kunz's interpretation of the term "commission", with the help of extrinsic evidence was a reasonable interpretation as applied to the facts of the case. *Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2015). If the District Court would have conducted such an analysis, it would have readily concluded that B. Kunz's proposed interpretation is unreasonable.

The paragraph in the Contract regarding Plaintiff's compensation states: Agent will receive 80 percent of commissions received on insurance placed by agent with Company. Company will receive 20 percent of commissions placed by agent with Company." Other

paragraphs in the contract refer to the payment of "commissions," without attempting to distinguish its meaning or usage from the term "commission" as used in paragraph 7. Specifically paragraphs 5 and 6 provide, in relevant part:

> Agent is responsible for all premium and return commission on business placed. When collections are not on time, deductions may be made from payment of commission due. When collection is completed the deducted commission will be paid.
>
> Agent is responsible for the collection of premiums and returned commissions on business placed. . . . Company will provide agent with a commission earned statement and commission check based on agreed percentages on the 15th of each month. . . .

The profit sharing payments that B. Kunz claims he is due are reliant upon formulas that are based on more than mere premiums collected. According to the extrinsic evidence including testimony and Exhibits 202, 204 and 205, R.Ex. 720 (Ex. 202), R.Ex. 192 (Exh.204), R.Ex. 216 (Exh.205), the guidelines for profit sharing or similar bonuses distinguished from basic commissions are dependent upon formulas which take into consideration such factors as annual volume of premiums written, earned premiums over several years, total losses incurred, incurred loss percentages, gross profit percentages, reduction for delinquencies, administrative expenses, Workers' Compensation dividends paid out during the year, and growth from year to year. (See Tr. Vol I. p. 41, L. 14 - p. 42, L. 10, Tr. Vol II. p. 352 L. 12-24, p. 358, L. 12-24, and p. 408, L. 18-23).

It is also clear that the commissions identified in the contract are limited to the ability of being paid on a monthly basis rather than annually. However, the parties both agree that profit sharing is paid annually. (Tr. Vol I. p. 56, L. 19-23, Tr. Vol II. p. 352, L. 21-24).

Additionally, B. Kunz's testimony was that he did not use the term "contingent commission" until after the suit was filed. (Tr. p. 177, L. 21-25). Although dated several years after the Agent Contract, B. Kunz's use of the terms "profit sharing" and "commissions" in his written correspondence to Defendant, dated January 16, 2013, entered as Exhibit 108, shows that B. Kunz understood that profit sharing and commissions have two distinctly separate meanings.

It was in error for the District Court to determine that the term "commission" was ambiguous without considering whether B. Kunz's proposed interpretation was reasonable given all of the facts as they applied to the interpretation of the contract. This Court can therefore conclude that the District Court erred as a matter of law that the term "commissions" is ambiguous.

VIII. THE DISTRICT COURT ERRED IN CONCLUDING THAT I.R.C.P. 41(b) IS INAPPLICABLE TO DECLARATORY JUDGMENT ACTIONS

The District Court denied Nield, Inc.'s motion for involuntary dismissal made pursuant to I.R.C.P. 41(b), because, according to the District Court, a motion for involuntary dismissal under I.R.C.P. 41(b) is not applicable in declaratory judgment actions. Tr. Vol 2 p. 339, L. 20 – p. 348, L. 3.

At the time of argument on the Motion for Involuntary Dismissal, the District Court stated:

> ...It seems to the court that by it's very nature a declaratory judgment action, brought pursuant to Idaho Code section 10-1201, is asking for just that, a declaratory judgment of the court regarding the rights of the parties, vis-à-vis in this case the contract in question.
>
> Even if Mr. Kunz and Ms. Kunz do not prevail with the court on their interpretation of this contract, or their asserted interpretation of the contract,

> doesn't the court still have an obligation under 10-1201 to grant the declaratory relief and identify and determine what the rights of the parties are vis-a—vis this contract? And if that is correct, isn't your motion of no consequence?
> . . .
> THE COURT: I'm not being asked to render affirmative relief in this case as far as a money judgment or a dismissal. I'm being asked to provide declaratory judgment and identify and explain the rights as between the parties.
> In my years of practice and my years on the bench I've never seen this motion brought in this context in a declaratory judgment hearing. I'm not sure it's appropriate and I'm not sure how it would work. Then I have not done what I was asked to do in the complaint and that is to declare the rights of the parties, vis-à-vis this contract.

Tr. Vol 2, p. 345, L. 4 – p. 346, L. 11. The ruling that I.R.C.P. 41(b) motions for involuntary dismissal are inapplicable in declaratory relief actions was clearly erroneous and an abuse of discretion. Idaho Courts recognize I.R.C.P. 41(b) as a procedural tool for defendants in declaratory judgment actions, and there was sufficient basis to grant Nield, Inc.'s I.R.C.P. 41(b) motion.

A. I.R.C.P. 41(b) is a Procedural Tool for Defendants in Declaratory Judgment Actions

Idaho Courts allow a defendant to receive a judgment in its favor, made on a motion under I.R.C.P. Rule 41(b), when the claim is for a declaratory judgment. *Smith v. State Bd.*, 74 Idaho 191, 259 P.2d 1033 (1953); *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 812 P.2d 253 (1991); *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002); Accord *McHenry State Bank v. City of McHenry*, 446 N.E.2d 521, 523 (Ill. App. Ct. 1983) (In a bench trial on a declaratory judgment action, the defendant may move for judgment in his or her favor at the close of the plaintiff's case.).

Idaho Code § 10-1201 Declaratory judgments authorized—Form and effect reads:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Idaho Courts prefer that a declaratory judgment should actually "declare rights, status, and other legal relations," rather than merely setting forth which side prevails. *TracFone Wireless, Inc. v. State*, 158 Idaho 671, 683, 351 P.3d 599, 611 (2015). However, a dismissal of a claim for declaratory judgment rather than a negative declaration is not a fatal flaw, should the trial court's findings and order clearly define the rights of the parties. *Camp v. East Fork Ditch Co., Ltd.,* 137 Idaho 850, 55 P.3d 304 (2002); *Brown v. State of Minnesota*, 617 N.W.2d 421, 425 (Minn. Ct. App. 2000).

In *Ketterer v. Independent School District No. 1 of Chippewa County*, 79 N.W.2d 428 (Minn. 1956), the trial court's judgment merely dismissed the plaintiff's complaint which contained a claim asking for declaratory relief. The Minnesota Supreme Court stated:

> The judgment in better from [*sic*] should have declared the rights of the parties in conformity with findings and conclusions of law. The declaration may be either affirmative or negative in form and effect. However, since the court's findings of fact, conclusions of law, and order for judgment resulting in a dismissal herein operates as an adjudication upon the merits, the failure to declare the rights of the parties on the state of the record in this case is, we think, here without prejudice and not reversible error. See *State, by Burnquist, v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278; Wright, Minnesota Rules, pp. 294, 295. Since the trial court's findings and order clearly defines the rights of the parties, we therefore do not find it necessary upon the particular facts of this case to order a modification of the judgment as entered.

Id. at 440.

I.R.C.P. 41(b) allows, that should the applicable standard be met, a declaratory judgment, negative in effect, to be entered. The language in the rule speaks in terms of "render judgment against the plaintiff" and "renders judgment on the merits against the plaintiff."

However, even if a declaratory judgment, negative in effect, could not be entered pursuant to I.R.C.P. 41(b), it is still appropriate to dismiss a declaratory judgment action. *Camp v. East Fork Ditch Co., Ltd.,* 137 Idaho 850, 55 P.3d 304 (2002) (judgment of the district court dismissing a claim for declaratory judgment resulting from defendant's motion for involuntary dismissal under I.R.C.P. 41(b) at the conclusion of the plaintiff's presentation of evidence at trial was affirmed). I.R.C.P. 41(b) requires that "the court must make findings as provided in Rule 52." So long as those required findings, as provided by I.R.C.P. 52 clearly define the rights of the parties, a dismissal of a declaratory judgment action would appropriately resolve the dispute and therefore be appropriate.

B. There was Sufficient Basis to Grant Nield, Inc.'s I.R.C.P. 41(b) Motion

The Kunzes failed to show at trial that they were entitled to declaratory judgment in their favor. *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 952, 812 P.2d 253, 259 (1991) ("The burden of proof in a declaratory relief action is governed by the same rules and considerations as are applicable to the same problem when it arises in legal proceedings of other types."); *Melaleucca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014) ("A Plaintiff who wishes to recover for a breach of contract bears the 'burden of proving the existence of a contract and fact of its breach . . . .'" *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (2000)).

The Kunzes could not receive the relief they requested because the contract was unambiguous.[14] They failed to show mutual assent. R. 520, ¶ 29. Even if this Court agrees with the District Court that the contract is ambiguous, the Kunzes still failed to meet their burden in showing that the meaning of the contract term "commission" included profit sharing. R. 521, ¶ 34 – 524, ¶ 38.

The Kunzes failed to meet their burden of proof, and the District Court erred in denying Nield, Inc.'s Motion for Involuntary Dismissal pursuant to I.R.C.P. 41(b). Such error by the District Court was clearly a misunderstanding of the law.

IX. NIELD, INC. IS ENTITLED TO ITS COSTS AND FEES ON APPEAL

The Kunzes are not entitled to attorney fees on appeal. Idaho Code § 12-120 does not support their claim.

Nield, Inc. requests that it be awarded its costs and fees on appeal. If this Court declines to award attorneys' fees at this time because the Judgment and Rule 54(b) Certification appealed from is a partial judgment and does not resolve all of the claims between the parties, creating a question on who is the prevailing party, *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, 152 Idaho 338, 345-46, 271 P.3d 1194, 1201-02 (2012), Nield, Inc. asks that this Court direct the trial court, after a final judgment has been entered, to award Nield, Inc. its costs and fees for defending and prevailing on appeal. *Bagley v. Thomason*, 149 Idaho 799, 804-05, 241 P.3d 972, 977-78 (2010).

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[14] See Issue VII, above.

Idaho Code § 10-1210 and I.A.R. 40 provide Nield, Inc. a basis to recover costs on appeal. Idaho Code §§ 12-120(1) and (3), 12-121, and I.A.R. 11.2 all provide independent grounds for an award of Nield Inc.'s costs and fees on appeal.

A. The Kunzes are not Entitled to Attorney Fees Under I.C. § 12-120

The Kunzes are not entitled to attorney fees under I.C. §12-120 as claimed because they are not the prevailing party to this appeal. Furthermore, the Kunzes appear to misapply which subsections under I.C. § 12-120 they would be entitled to attorney fees. Any award of attorney fees to the Kunzes is unjustified.

B. Nield, Inc. Should be Awarded its Costs Under I.C. § 10-1210

While Idaho Code § 10-1210 does not provide a statutory basis for awarding attorney fees, it does provide a foundation for this Court to award Nield, Inc. its costs. *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 542-43, 112 P.3d 825, 830-31 (2005). It would be equitable and just to award Nield, Inc. its costs on appeal where this case stems from an action brought under the Uniform Declaratory Judgment Act and the Kunzes' arguments are unreasonable and lack foundation in law.

C. Nield, Inc. Should be Awarded its Costs Under I.A.R. 40

I.A.R. 40 provides costs to the prevailing party on appeal. This Court can determine that Nield, Inc. prevailed on appeal and award its costs.

D. Nield, Inc. Should be Awarded its Costs and Fees Under I.C. § 12-120(1)

I.C. § 12-120 applies to attorney fees on appeal as well as to trial. *St. Alphonsus Regional Medical Center, Ltd., v. Killeen,* 124 Idaho 197, 201, 858 P.2d 736, 740 (1992). Attorney fees

are permitted as part of costs to the prevailing party where the underlying pleading requests under $35,000 in damages. *Humphries v. Becker*, 159 Idaho 728, 740, 366 P.3d 1088, 1100 (2016). Here the amount pled by the Kunzes was under $35,000, and Nield, Inc. prevailed on appeal. Nield, Inc. is entitled to its attorney fees as the prevailing party on appeal.

E. Nield, Inc. Should be Awarded its Costs and Fees Under I.C. § 12-120(3)

I.C. § 12-120(3) serves as a clear basis for an award of attorney fees to Nield, Inc. in this case. Section 12-120(3) provides that in any action to recover on a contract relating to "services" and "in any commercial transaction" the prevailing party shall be allowed reasonable attorney fees to be set by the court, to be taxed and collected as costs. I.C. § 12-120(3).

The contract at issue is a services contract whereby B. Kunz agrees to sell insurance policies on behalf of Nield, Inc. The relationship between the parties is also a commercial transaction. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. I.C. § 12-120(3). This was a transaction to provide professional services, and is not a transaction for personal or household purposes.

Additionally, because Nield, Inc. was successful in defending an action where the plaintiff pled for attorney fees under I.C. § 12-120 in his Complaint, Nield, Inc. is entitled to attorney fees as the prevailing party. *Bryan Trucking Inc. v. Gier*, 160 Idaho 422, ___ P.3d ___ (2016) (A prevailing party may rely on I.C. § 12-120(3) if pled by another party for recovery of attorney fees even if the alleged commercial transaction is found not to have existed." (Citing *Miller v. St. Alphonsus Regional Medical Center, Inc.*, 139 Idaho 825, 839, 87 P.3d 934, 948 (2004)).

F. Nield, Inc. Should be Awarded its Costs and Fees Under I.C. § 12-121

It is appropriate for this Court to find that the Kunzes have brought this appeal unreasonably and without legal foundation and therefore award Nield, Inc. its attorney fees on appeal. *Kirkman v. Stoker*, 134 Idaho 541, 546, 6 P.3d 397, 401 (2000) ("This Court may award attorney fees on appeal pursuant to I.A.R. 41 and I.C. § 12-121 if it finds the appeal was brought without foundation."). The issues raised by the Kunzes ask this court to ignore firmly-established law. *Id.* The crux of their appeal is an improper invitation for this Court to "substitute its own judgment for that of the trial court." *Id.* Because the Kunzes merely ask this Court to reweigh the evidence, their appeal is brought without foundation. *Kelley v. Yadon*, 150 Idaho 334, 338, 247 P.3d 199, 203 (2011). As the prevailing party on appeal, an award of Nield, Inc.'s costs and attorney fees pursuant to I.C. § 12-121 is appropriate.

G. This Court Should Impose Sanctions Under I.A.R. 11.2

Nield, Inc. requests attorney fees on appeal as an appropriate sanction because the Kunzes' *Second Amended Notice of Appeal* and *Appellant's Brief* violates I.A.R. 11.2. This Court has held that I.A.R. 11.2 is to be construed the same way as I.R.C.P. 11(a)(1) because the rules have virtually identical wording. *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 913 (2014). I.A.R. 11.2 is construed as follows:

> The attorney's or party's signature on a document constitutes two substantive certifications: (a) that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, **and** (b) that it [the document] is not interposed for any improper purpose. Both certifications must be accurate in order to comply with the rule. If

> either of them is not accurate, then the document would be signed in violation of the rule.

Id. at 913-14 (emphasis in original). Attorney fees may be awarded as sanctions when a party or attorney violates either (a) the frivolous filings clause, or (b) the improper purpose clause. *Id.* at 914. Sanctions in this appeal are appropriate under either prong of I.A.R. 11.2.

1. The Issues Advanced on Appeal are Frivolous

Advancing arguments that are without basis in law or fact satisfies the frivolous filings clause of I.A.R. 11.2. *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 342 P.3d 639, 648 (2015). The arguments advanced by the Kunzes in this appeal are without basis in law or fact.

Examples of frivolous arguments in this appeal include claiming that the Court relied on undisclosed subjective intent when there is no basis in fact that such was the case; applying an unreasonable extension of the objective law of contracts; claiming that the Court ignored facts and legal arguments, when these claims conflict with the record; suggesting that the trial court did not let the facts lead its conclusions, *Appellant's Brief*, p. 32; arguing that the Court erred in failing to construe the contract against the drafter, but recognizing that the facts of the case did not fit within the cited law, *Appellant's Brief*, p. 36, fn. 35; raising issues on appeal of deficiencies with the December 22, 2015 Judgment, and at the same time recognizing that this is only an appeal of a partial judgment, *Appellant's Brief*, p. 39. Generally, *Appellant's Brief* frivolously asks this court to ignore firmly-established law and invites this Court to simply

reweigh the evidence and substitute its own judgment for that of the trial court. *Kelley v. Yadon*, 150 Idaho 334, 338, 247 P.3d 199, 203 (2011).

The *Second Amended Notice of Appeal* and *Appellant's Brief* is not well grounded in fact and is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This Court should award Nield, Inc.'s attorney fees on appeal as an appropriate sanction for violation of Rule 11.2.

2. Appellant's Brief is Brought for an Improper Purpose

No doubt the *Appellant's Brief* is brought for the improper purpose of harassing and needlessly increasing the cost of litigation. The *Appellant's Brief* improperly airs personal grievances, which disparage B. Nield as a deceitful liar. *Appellant's Brief*, (references to such allegations are made throughout but specifically p. 20, fn 22). Such diatribe does nothing to reasonably advance the argument of whether the District Court erred on the issues raised on appeal and can only be seen as being made for an improper purpose.

CONCLUSION

Nield, Inc. requests that this Court affirm the December 22, 2015 Judgment; render an opinion that the District Court erred in concluding the contract was ambiguous and erred in dismissing Nield, Inc.'s I.R.C.P. 41(b) motion for involuntary dismissal; and grant Nield, Inc. its costs and fees incurred in defending this appeal, or, at a minimum, direct the District Court, after a final judgment in this case has been entered, to award Nield, Inc. its costs and fees.

DATED this 4th day of August, 2016.

Joseph T. Preston
Attorney for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of August, 2016, I served two true and correct bound copies of the foregoing document upon each of the following individuals in the manner indicated.

Steven A. Wuthrich
Attorney at Law
1011 Washington St., Suite 101
Montpelier, ID 83254

☒ U.S. Mail
☐ Hand Deliver
☐ Overnight Mail (FedEx)
☐ Facsimile (Fax)
☐ Electronic Mail (Email)

For ECHO HAWK & OLSEN, PLLC

requests that judgment be entered against the Defendant for the total sum of the unpaid commissions owed under the Contract in the amount as shall be proven at trial, but not less than ten-thousand dollars ($10,000.00).

26. That Plaintiff did, more than ten days prior to the filing of this action, make demand upon the Defendant, and Defendant has refused to provide an accounting, other than to advise the Plaintiff that Defendant was invoking the buy-out provisions of the Contract.

27. Plaintiff should have and recover his court costs and attorney's fees pursuant to Idaho Code Sec. 12-120, which sum would be $750 is judgment be by default, or a greater sum if this matter is contested.

28. That Plaintiff should have and recover prejudgment interest at the rate of 12% per annum on all sums found properly due Plaintiff pursuant to I.C. §28-22-104 from the time such sum was due until judgment herein shall enter.

COUNT TWO - DECLARATORY RELIEF

29. All prior averments are incorporated herein by reference.

30. Pursuant to I.C.§10-1201 *et seq.*, Plaintiff prays for declaratory relief that (1) the agent contract in question does include all bonuses commissions, incentives, profit sharing or other remuneration received by Nield Inc., in any way affected, increased, decreased or influenced by Plaintiffs sales of insurance policies; (2) that the appropriate share of Plaintiff's portion of the bonus or profit sharing is 80% of that portion generated by Plaintiff's insurance sales; and (3) that Defendant has no interest in life and health insurance sold by Plaintiff or his wife and no interest in the health insurance book of business bought from Mike Kunz' widow and enhanced or prospered thereafter by Marti Kunz.

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Attorneys for Nield, Inc., dba Insurance Designers

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ and
MARTI KUNZ,

Plaintiffs,

v.

NIELD, INC., dba INSURANCE
DESIGNERS, an Idaho Corporation

Defendant.

Case No.: CV-2013-232

MOTION IN LIMINE TO STRIKE PLAINTIFFS' TRIAL BRIEF/OPENING STATEMENT

COMES NOW Defendant, Nield, Inc., dba Insurance Designers, an Idaho Corporation (hereinafter referred to as Nield, Inc. or Defendant for convenience), by and through its counsel of record, Echo Hawk Law, and moves this Court for an order Striking Plaintiff's *Trial Brief/Opening Statement* or other appropriate sanction against the Plaintiffs, not to include a continuance of the trail.

Defendant's motion is based upon Idaho Rules of Civil Procedure (IRCP) 16(a), the Court's Scheduling Order dated April 14, 2014, and the following points:

1. IRCP 16(a) gives the Court authority to addresses scheduling conferences and scheduling orders.

2. The Court's Scheduling Order dated April 14, 2014 provides:

   TRIAL BRIEFS: The Court encourages (but does not require) the submission of trial briefs which address important substantive or evidentiary issues each party expects to arise during trial. Any trial briefs shall be prepared, exchanged between the parties, and lodged with the Clerk (with copies to Chambers in Soda Springs, Idaho) at least ten (10) days prior to trial.

3. Defendant received Plaintiffs' *Trial Brief/Opening Statement* on December 4, 2014, one and a half working days prior to trial.

4. Defendant is prejudiced by the Plaintiffs' severe tardiness in submitting their Trial Brief, and failure to submit the brief in a simultaneous manner.

5. It appears that Plaintiffs used the Defendant's Trial Brief in the preparation of their own Trial Brief.

6. By submitting their Trial Brief at such a late date, Plaintiff has taken an unfair advantage, particularly as the party with the burden of proof and which is generally tasked with the initial presentation of statements and evidence.

7. In addition, Plaintiffs' Trial Brief alleges facts and theories that are not relevant or at issue in accordance with the current pleadings.

8. Defendant is left guessing whether Plaintiffs plan on trying to present and prove at trial evidence beyond the scope of the scheduled trial on only the declaratory judgment, and is prejudiced by the late presentation of alternative theories contained in Plaintiffs' Trial Brief.

9. The Plaintiffs have in essence put the onerous on the Defendant by waiting to first receive and review the Defendant's Trial Brief before making responses and arguments in its Trial Brief.

27.[6] In fact, because of B.Kunz' business relationship with M.O. Kunz, N.I. and B.Kunz entered into an "Agent Contract" in 1996 as well. *See* Tr. Ex. 102.[7] This "Agent Contract" mirrored the agreement that B.Kunz had with M.O.Kunz and paid B.Kunz "80% of commission received on insurance placed with" N.I. with N.I. receiving 20%. *See* Tr. Ex. 102.

7. B.Kunz testified that he never received any profit sharing or contingent commission while operating as a sub-producer for M.O.Kunz. Tr., p. 27, LL. 18-19. He testified further that he did not expect to receive or share in any profit sharing or contingent bonuses. Tr. p. 90, LL. 21-23. The reason why B.Kunz did not expect to share in the bonuses is outlined in his cross-examination testimony when he was asked to read from his prior deposition testimony. In doing so, his deposition testimony relates that the reason he did not receive bonuses under the 1996 "Agent Contract" is because he "didn't own the book of business." Tr. p. 138, LL. 22-23.

8. Following M.O.Kunz' death, B.Kunz and M.Kunz purchased M.O.Kunz' share of the book of business or "business placed" by M.O.Kunz with N.I. and the insurance agency located in Montpelier from M.O.Kunz' surviving spouse, Judy Kunz. Tr., p.27, LL. 7-8, and Tr. Ex. 128.

9. Around the time that B.Kunz and M.Kunz purchased M.O.Kunz' book of business and the insurance agency, B.Kunz and N.I. began to have discussions with N.I. concerning their business relationship. B.Kunz testified that a "new contract became necessary that would include

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[6]As outlined above, a certified copy of the transcript of these trial proceedings was prepared by the Court's Court Reporter, Rodney M. Felshaw. The Trial Transcript consists of two (2) volumes; the first volume includes the testimony for the first day of trial and consists of pages 1 through 262. The second volume includes the testimony for the second day of trial and consists of pages 263 through 427. The Court will cite to this transcript in these F.F.C.L. & M.D.O. as "Tr." followed by the relevant page and line numbers.

[7]Although Tr. Ex. 102 purports to be signed on January 1, 1982, the Court finds this to be a scrivener's error. B.Kunz's testimony is clear that he did not begin working in the insurance industry until 1996. *See* Tr., p. 23, LL. 24-25 and p. 24, L. 1. He also testified that this date was in error. *See* Tr., p. 132, LL. 24-25, p. 133, LL. 1-10. What appears to have happened is that N.I. used its Agent Contract with M.O.Kunz as a template for its Agent Contract with B.Kunz and in making the revisions, modifications and additions to the document in order to memorialize the parties' agreement, N.I. did not modify the date of the Agent Contract. This is supported not only by B.Kunz's testimony but by the fact that the date on M.O.Kunz's "Agent Contract"

an ownership clause similar to the one contained in M.O.Kunz' "Agent Contract" with N.I. B.Kunz' 1996 "Agent Contract" did not contain an ownership clause. Tr., p. 33, LL. 4-8. B.Kunz testified that one of the advantages of being a sub-contractor or having an "Agent Contract" with N.I. was to gain access to better contracts with certain insurance companies. Tr. p. 98, LL. 22-25.

10. B.Kunz testified that it was suggested by B.Nield that B.Kunz and N.I. just sign the same contract that it had with M.O.Kunz. Tr., p. 34, LL. 5-7. Later, B.Kunz testified that he and M.Kunz wanted the same kind of contract that M.O.Kunz had with N.I. Tr., p. 132, LL. 16-18.

11. B.Kunz testified that in October of 2008, a draft of the prospective "Agent Contract was prepared and brought, by B.Nield, to his office, in Montpelier, for his and M.Kunz' review. Tr., p. 33, LL 13-25. B.Kunz testified that both he and M.Kunz closely reviewed the draft of the prospective "Agent Contract." *See* Tr. Ex. 103. B.Kunz testified that this draft of the prospective "Agent Contract" appeared, to him and M.Kunz, "to mirror the [Agent] Contract with [M.O.Kunz]. Tr. p. 34, LL. 4-8.

12. B.Kunz testified that upon being presented with a draft of the prospective "Agent Contract between B.Kunz and N.I., he was told that if he and M.Kunz "were okay with it, he [B.Nield] would take it back and put it on [N.I.'s] letterhead." Tr. p. 33, LL. 21-25.

13. B.Kunz testified that following this meeting in October of 2008, he expected that the final document he was to be presented for signature would contain the terms of draft of the prospective "Agent Contract" between B.Kunz and N.I. as reflected in Tr. Ex. 103.

14. B.Nield testified that typically N.I. has its contracts on N.I. letterhead. He also stated that the language in Tr. Ex. 103 is similar to that contained in its contracts, but because it is not on

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was January 1, 1982.

N.I. letterhead, he "does not believe that [he] drafted it." Tr. p. 195, LL. 1-5. He also denies that he came to Montpelier and delivered it to B.Kunz and M.Kunz. Tr., p. 195, LL. 5-7.

15. B.Kunz testified that during the latter part of October, 2008 or the early part of November, 2008, T.Nield, B.Nield, and Ben Nield came to B.Kunz' office in Montpelier, Idaho. B.Kunz' testimony continues that he was presented with the "Agent Contracts" for himself and M.Kunz. B.Kunz explains that because "I had looked at draft [of the prospective "Agent Contract" between B.Kunz and N.I. as reflected in Tr. Ex. 103] [he] did not look at that contract very closely." Tr. p. 35, LL. 8-16. The "Agent Contracts" for B.Kunz and M.Kunz were signed on this occasion. *See* Tr. Ex. 104 (M.Kunz "Agent Contract") and Tr. Ex. 105 (B.Kunz "Agent Contract"). However, the "Agent Contract" reflects that the effective date of the contract is January 2009.

16. The "Agent Contract" between B.Kunz and N.I. was drafted by B.Nield. Tr. p. 195, LL. 17-19.

17. B. Kunz also testified that on this occasion, B.Nield "mentioned ... that they had had some pretty good profit sharing checks with [M.O.Kunz]."[8] Tr. p. 35, LL. 15-16.

18. The 2009 "Agent Contract" entered into between B.Kunz and N.I. contains the following provisions that are pertinent to the dispute of the parties:

(1) Paragraph 5 outlines the responsibilities of the agent, B.Kunz. These responsibilities include: (a) being identified as a subcontractor and having responsibility for all expenses related to

[8] "Contingent commission" and "profit sharing" are phrases that appear to be used interchangeably in the insurance industry and certainly amongst the parties in this litigation. B.Kunz defines these phrases in the following terms: "Profit sharing, sometimes called 'contingent commissions,' is remuneration paid by the insurance company on generally an annual basis and predicated on a variety of factors, including written premium, loss ratios, and new business." Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 5, ¶ 23. Similarly, N.I. defines these phrases in the following fashion: "A contingent commission or profit sharing is a form of compensation that is different than monthly commission because the contingent commission or profit sharing is conditioned upon an agent meeting certain guidelines." Defendant's Proposed Findings of Fact and Conclusions of Law and Order, p. 9, ¶ 35.

looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.'" *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011) (*Beus*).

17. The Court, upon review of the parties' 2009 "Agent Contract", also concludes that there is at least one ambiguity in the 2009 "Agent Contract."

18. At trial the Court allowed the introduction of extrinsic or parol evidence with the understanding and expectation that there was an ambiguity in the parties' "Agent Contract" and that it would be necessary for the Court, as the fact finder in this litigation, to attempt to ascertain the intent of the parties by resorting to the review and consideration of extrinsic evidence of the type allowed and discussed in *Beus*. In addressing this issue, the Court noted as follows:

> I think the crux of this case is that there is an ambiguity, or arguably an ambiguity, regarding commission. So the court is going to allow extrinsic evidence or parol evidence to determine what the intent of the parties was. And it's very relevant and important, both what Mr. Kunz's understanding was as well as what Mr. Nield's understanding or belief of the term commission was as utilized in this document, both in paragraph seven and other paragraphs....

Tr. p. 238, LL. 3-11.

19. The ambiguity relates to the same language cited above to support the Court's conclusion that the document is not integrated. *See* Conclusions of Law Nos. 12, 13, 14, and 15. Paragraph 6 begins with the heading titled "Responsibilities of Company", N.I. Paragraph 6 of the parties' "Agent Contract" reads as follows:

> [N.I.] will maintain contracts with companies for placing of insurance. [N.I.] will do all billing and accounting functions (except collections). [B.Kunz] is personally responsible for the collection of premiums and returned commissions on business placed. [N.I.] will provide to [B.Kunz] a 1099 Form showing annual earnings. [N.I.] will provided [B.Kunz] with a commission earned statement and

> commission check based on agreed percentages on the 15th day of each month. Other functions based on commission split and individual agreement.

The Court, in reviewing this specific provision and the "Agent Contract" as a whole, concludes that the last sentence of Paragraph 6 is ambiguous and the Court cannot ascertain what it means based upon the reading of the individual sentence, the paragraph as a whole, or the "Agent Contract" as a whole.

20. Nothing in the parties' "Agent Contract" expressly identifies or defines what "other functions" means or what "individual agreements" relates to. To this Court these phrases seem to have no place within this document other than to notify the reader and the parties that there are other unexpressed functions and individual agreements not discussed and/or outlined in the body of this document. One of these, after considering all of the evidence, is the separate and individual agreement dealing with Gem State Insurance's profit sharing. *See* Findings of Fact Nos. 30, 31 and 32.

21. Pursuant to *Beus*, the intent of the parties with respect to ambiguous or unclear contract provisions "is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings." 151 Idaho at 238, 254 P.3d at 1234. The Court will refer to these factors as "the *Beus* factors" in its discussion of the same.

22. The problem with both parties' positions is that the evidence, in the trial record, demonstrates that there was much not much, if any, discussion regarding this contract or its individual provisions.

23. The nature and character of the parties' relationship changed upon the death of M.O.Kunz. It appears to the Court that there was little or no negotiation concerning their business relationship between B.Kunz, B.Nield or any other representative of N.I. What little negotiation there was appears to be limited to one (1) meeting in Montpelier, Idaho in October of 2008 where the "Agent Contract" was discussed. However, the extent of that discussion appears to be limited to the fact that the "Agent Contract" would mirror that of M.O.Kunz. The second meeting in Montpelier is where the document was presented and signed by B.Kunz without much review or discussion. *See* Findings of Fact Nos. 9 through 11.

24. The details of the "Agent Contract" and the language were not discussed. It was obvious from the express language of the "Agent Contract", the parties' course of dealings, and their trial testimony, that B.Kunz would receive 80% of the commissions relative to new business or policies sold (initial commissions) and 80% of the commissions associated with renewals with respect to his existing book of business (residual commission). It was also obvious from the express language of the "Agent Contract", the parties' course of dealing, and their trial testimony, that B.Kunz would own 50% of his book of business and that N.I. would own the other 50%. However, it is far from clear when one considers the express language of the parties' "Agent Contract" (which this Court has found to be ambiguous and unclear), the parties' course of conduct, and their trial testimony, what their intent was concerning profit sharing.

25. However, the parties' course of conduct does reflect a course of dealings between the parties for each of the relevant years 2008 through 2012, except 2009,[23] with respect to profit sharing or contingent commissions, or bonuses.

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[23]In 2009, B.Kunz did not qualify for profit sharing from Gem State Insurance. In addition, he did not receive any profit sharing

26. In October or November of 2008, when the parties were meeting to finalize their "Agent Contract", B.Kunz testified that B.Nield "mentioned ... that they [N.I. and M.O.Kunz] had had some pretty good profit sharing checks with [M.O.Kunz]." *See* Finding of Fact No. 17. A second statement was made by B.Nield to B.Kunz at N.I.'s office in Pocatello, Idaho between November 2008 and February of 2009 concerning "how nice the profit sharing checks were."[24] *See* Finding of Fact No. 19.

27. In 2009, B.Kunz received profit sharing with respect to Gem State Insurance for profit sharing earned in 2008 (*See* Finding of Fact No. 20), in 2010, B.Kunz received profit sharing with respect to Gem State and Acuity (*See* Finding of Fact No. 22), in 2011, B.Kunz received profit sharing with respect to Gem State and Alliance (*See* Finding of Fact No. 23), and in 2012, B.Kunz received profit sharing from Gem State and Acuity. (See Findings of Fact Nos. 24 and 25).[25]

28. As a result of the foregoing, this Court concludes that B.Kunz has established a course of dealing with B.Nield, a representative and principal of N.I., sufficient to establish an agreement, separate and apart from their non-integrated "Agent Contract" (an "individual

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or contingent commission with respect to any other company. *See* Finding of Fact No. 21.

[24]The Court recognizes that these claims by B.Kunz concerning statements made by B.Nield are disputed and that B.Nield denies making said statements. However, the Court has determined that B.Kunz' testimony is more credible and reliable on these points and accepts his testimony as being accurate and truthful on these points. There are a number of reasons for the Court's determination on this point, chief among them being that long before the litigation was filed or even contemplated by these parties, B.Nield and N.I. freely used the term profit sharing in dealing with B.Kunz with respect to Gem State Insurance, Acuity and Farmers Alliance. Not only was this term used on check receipts (B.Nield testified that the phrase profit sharing was used on some documents generated by N.I., because of its accounting software). *See* Tr. Ex. 111, p. 2, it was also freely used in B.Nield's Memo's to B.Kunz. *See* Tr. Ex.'s 106, 107, and 109. Never once, prior to this litigation, did B.Nield dispute, correct or suggest to B.Kunz that profit sharing was not part of their relationship and that B.Kunz was off base in his understanding that there was profit sharing. It is inconceivable to this Court, that a business, such as N.I., and/or a principal in said business, such as B.Nield, would allow a partner or colleague such as B.Kunz to continue uncorrected when it was so clear that he believed that he was entitled to profit sharing. The dialogue was never about whether profit sharing existed, but the amount of the split. *See* Tr. Ex.'s 108, 109, and 110.

[25]The Court recognizes that this Conclusion of Law is contrary to the position asserted by N.I, specifically when B.Nield, in his testimony, wherein he states that N.I. does not pay profit sharing. *See* Finding of Fact No. 29. Instead he characterizes these payments as purely gratuitous bonuses made by N.I. *See* Tr. p. 202, LL. 10-15. However, for the same reasons articulated in

agreement" as discussed in Paragraph 6) for the payment of profit sharing or contingent bonuses to B.Kunz with respect to Gem State Insurance.

29. However, the Court cannot make a finding that there has been a meeting of the minds or an agreement as to the percentage split. As most recently stated by the Idaho Supreme Court in *Safaris Unlimited, LLC v. Von Jones*, 2015 WL 4381069, *4, the "'formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract.' Whether a contract has been formed 'is generally a question of fact for the trier of fact to resolve.'" In this instance, this Court cannot conclude that N.I. ever agreed, either by the express terms of the "Agent Contract", or by a course of dealings with M.O.Kunz or B.Kunz, to pay B.Kunz 80% of the profit sharing attributable to Gem State Insurance. The reasons include, but are not limited to: (1) except for in 2012, N.I. never paid 80% of the contingent commission from Gem State to B.Kunz and even in 2012 they did so as an attempt to show good faith to B.Kunz rather than accepting his position; (2) there was no evidence that N.I. ever paid M.O.Kunz 80% of the contingent commission from Gem State, M.O.Kunz' contract with N.I. being the contract and business relationship after which the B.Kunz contract and relationship with N.I. was modeled; and (3) even the oral and written discussions in which this agreement is established contain no reference to a percentage split either 50/50 or 80/20. As such, the course of dealings established between 2008 and 2012 with respect to Gem State Insurance is that the parties had an individual agreement that they would split the profit sharing associated with Gem State Insurance, but that the amount was never agreed upon. Despite the amount never being agreed upon, the parties' course of conduct, as established by the evidence at

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Footnote 22, the Court does not find this position to be credible.

trial, is that N.I. paid B.Kunz 50% of the profit sharing attributable to Gem State and retained 50%. B.Kunz accepted these amounts each year, albeit it under protest. This is the parties' course of dealings. The Court cannot write the terms of this parties' "Agent Contract". The course of dealings only allows for the 50/50 split, the amount paid by N.I. and accepted B.Kunz.

30. Therefore, the Court concludes that by course of conduct, N.I. did commit and contract to pay B.Kunz 50% of the profit sharing attributable to Gem State Insurance.

31. However, the more difficult question is whether a course of dealing has been established sufficient to conclude that an "individual agreement" has been reached between N.I. and B.Kunz for the payment of contingent commissions or profit sharing with respect to the other companies at issue, Acuity, Allied and Alliance.

32. B.Kunz would have this Court, "by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings (the *Beus* factors), determine that the parties had an agreement for profit sharing or contingent commission splits and that this agreement provides that B.Kunz is entitled to 80% of the profit sharing or contingent commission arising from his book of business (including Gem State, Acuity, Alliance, and Allied) and N.I. is entitled to 20% of the profit sharing or contingent commission from his book of business. *See* Finding of Fact No. 28.

33. In order to reach this conclusion the Court would have to find that the term "commission" as used in the parties' "Agent Contract", is ambiguous.

34. Nowhere in the "Agent Contract" is the term "commission" defined. Not surprisingly, the parties attempt to define commission in different fashions, each utilizing a

definition that best suits their purpose. B.Kunz wishes to apply a more generalized and laymen's definition to this term and have it include all types of commission, including what has been characterized as the "initial commission" (commissions paid on the premium obtained for new business and/or policies), "residual commissions" (commissions paid on the premium obtained for existing business that is renewed), and "contingent commissions" (commissions paid based upon factors, contingencies, and criteria established by the insurance company on whose behalf the insurance agent is selling insurance products). N.I. in turn wants the Court to use a much narrower and restrictive definition to the term "commission. N.I. argues that the term "commission" is a term of art in the insurance industry. N.I contends that term "commission" as utilized in the parties' "Agent Contract" should be limited to the definition applied to this term by the National Association of Insurance Commissioners as contained in its Glossary of Insurance Terms. *See* Tr. Ex. 209.

35. The Court agrees that the term "commission", especially in the insurance industry can be viewed in broader terms, encompassing all forms and character of "commissions", including, but not limited to "initial commissions", "residual commission, and "contingent commissions." Similarly, the Court recognizes that it could be used in a more restrictive context. The problem is that their document, the "Agent Contract" itself, makes no express attempt to establish which definition is being used. However, the Court, by employing the *Beus* factors: (1) the language used in the document, (2) the circumstances under which it was made, (3) the objective and purpose of the particular provision, and (4) any construction placed upon it by the contracting parties as shown by their conduct or dealings, the Court concludes that the parties' intended to limit the meaning of "commissions" to the more restrictive and narrow meaning of

commission of a "percentage of premium paid to agents by insurance companies for the sale of policies" both new business and existing renewals. *See* Exhibit 209, p.5.

36. The reasons the Court reaches this conclusion are as follows: (1) the language of Paragraph 6 in B.Kunz' 1996 "Agent Contract" and his 2009 "Agent Contract" is substantively identical. There are a few stylistic revisions or modifications in the 2009 "Agent Contract", but substantively this Court can discern no difference between the two; (2) the language of the Paragraph 7 in B.Kunz 1996 "Agent Contract" and his 2009 Contract is virtually identical;[26] (3) B.Kunz freely admits that under the 1996 "Agent Contract" and his previous relationships with both M.O.Kunz and N.I., he did not receive and did not expect to receive profit sharing or contingent bonuses (*See* Finding of Fact No. 7); (4) reading the contract as a whole, other paragraphs referring to the payment of "commissions" (the same term being used and no attempt being made to distinguish it in meaning or usage from the term "commission" as used in paragraph 7) in the context of monthly payments of commission (Company will provide agent with a commission earned statement and commission check based upon agreed percentages on the 15th day of each month."); and (5) B.Kunz' own statement that the purpose of entering the 2009 "Agent Contract" was to create a "new contract that would include an ownership" clause similar to the one contained in M.O.Kunz' "Agent Contract" with N.I.[27]

37. The parties' course of dealings clearly reflect that the commissions were paid monthly on "initial commissions" earned off of premiums received from new policies or business and "residual commissions" earned off premiums received from existing policy renewals.

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[26]The only difference the Court could see is in the phrase "by agent" is added immediately following the term "placed." The Court cannot see that this insertion of "by agent" changes the meaning in any manner.

[27]One would certainly expect that if this issue (profit sharing and the percentage split between N.I. and B.Kunz) had been contemplated by the parties and intended to be part of their agreement, it would have been expressly addressed in their 2009

However, both B.Kunz and B.Nield acknowledge that contingent commissions (at least with respect to the insurance companies at issue – Gem State Insurance, Acuity, Alliance and Allied) are paid annually. As such, it appears that the use of commissions in paragraph 6 is referencing the same commission in paragraph 7 and both seem clearly to be limited to commissions capable of payment monthly rather than annually.

38. Therefore, the Court cannot accept B.Kunz' asserted definition for "commission."

39. Unfortunately, the Court cannot find that the parties have an "individual agreement" outside of and separate to their "Agent Contract". Neither can the Court find that their Agent Contract is intended to set out terms and conditions associated with profit sharing or contingent commissions associated with Acuity, Alliance, and Allied.[28]

40. However, once again the Court cannot find that an agreement exists outside the four corners of the parties' "Agent Contract" whereby N.I. contractually agreed to pay B.Kunz a 50/50 split, an 80/20 split, or for that matter any amount of a split associated with contingent bonuses

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"Agent Contract."

[28]The Court's use of the term "unfortunately" is not suggestive of this Court harboring a prejudice or bias in favor of Kunz. Rather it is suggestive of the Court's conclusion that it believes B.Kunz' testimony in many respects regarding the verbal statements made by B.Nield concerning profit sharing, specifically as it relates to Findings of Fact Nos. 17 and 19. Just as the Court addressed in Footnote No. 24, the Court has determined that B.Kunz' testimony is more credible and reliable on these points and accepts his testimony as being accurate and truthful on these points. There are a number of reasons for the Court's determination on this point, chief among them being that long before the litigation was filed or even contemplated by these parties, B.Nield and N.I. freely used the term profit sharing in dealing with B.Kunz with respect to Gem State Insurance, Acuity, and Farmers Alliance. Not only was this term used on check receipts (B.Nield testified that the phrase profit sharing was used on some of documents generated by N.I.'s because of its accounting software), (*See* Tr. Ex. 111, p. 2); it was also freely used in B.Nield's Memo's to B.Kunz. *See* Tr. Ex.'s 106, 107, and 109. Never once, prior to this litigation, did B.Nield dispute, correct or suggest to B.Kunz that profit sharing was not part of their relationship and that he was off base in his understanding that there was profit sharing. It is inconceivable to this Court that a business, such as N.I., and/or a principal in said business, such as B.Nield, would allow a business partner or colleague such as B.Kunz to continue uncorrected when it was so clear that he believed he was entitled to profit sharing from all insurance companies in the amount of 80/20 split. It is also curious to the Court that the profit sharing was paid in odd amounts, suggestive of the application of some type of formula (B.Kunz argued that this is indicative of an intent to deceive B.Kunz into believing he was receiving a profit sharing check pursuant to a 50/50 split or 80/20 split). Although the Court declines to make such a finding, any time in this Court's experience that it has been the recipient of a gratuitous bonus from a former employer or as an employer providing an employee with a gratuitous bonus, it has been a rounded number, for example $500.00 or $1,500.00, not once has it been in an odd amount such as $663.50, $629.00, or $424.00.

paid from Acuity, Alliance, and Allied. Rather, it appears to this Court that N.I.'s payment of bonuses, characterized as "profit sharing, to B.Kunz was a purely arbitrary and gratuitous act on N.I.'s part."[29]

CONCLUSION

Based upon the Court's Findings of Fact and Conclusion of Law outlined above, the Court provides the parties with the following declaratory relief and pursuant to I.C. §10-1201 will enter a Declaratory Judgment as follows:

(1) The parties' "Agent Contract" is not integrated and is not intended to be a final expression of their agreement or for that matter the only agreement between the parties with respect to their business relationship.

(2) The parties had a separate and "individual agreement" which was established by their testimony at trial and their course of dealing with one another whereby N.I. paid B.Kunz profit sharing in the amount of a 50/50 split for profit sharing or contingent bonuses earned from Gem State Insurance Company.

(3) In addition to their "Agent Contract" being a non-integrated document, Paragraph 6 of their "Agent Contract", specifically the last sentence is unclear, vague and ambiguous, specifically, the last sentence of Paragraph 6. However, the Court cannot determine, upon

[29]This Court questions the business practices of B.Nield and N.I. This Court believes N.I. allowed B.Kunz to proceed with the purchase of M.O.Kunz' book of business, allowed B.Kunz to operate under the parties' "Agent Contract" equipped with the understanding that he would receive profit sharing, and later when these discussions occurred regarding profit sharing, did nothing to outline clearly its position concerning profit sharing and correct B.Kunz on these issues. In fact, N.I. never asserted this position or informed B.Kunz of it until litigation. However, despite this Court's discomfort with this scenario, the Court can find no legal basis upon which to find the parties had a legally enforceable contract regarding profit sharing. However, while the Court has spent, perhaps an inordinate amount of time questioning the business practices of N.I., B.Kunz is not without blame in this matter. The Court is not sure B.Kunz exercised due diligence with Judy Kunz, M.O. Kunz, and N.I. concerning their business relationship. If he had, he likely would have found some evidence of profit sharing which would have bolstered his claim in this proceeding or found that this course of dealings did not exist and been more vigilant in negotiating for it and reducing it to some form of written documentation.

In the Supreme Court of the State of Idaho

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiffs-Appellants, v. NIELD, INC., dba INSURANCE DESIGNERS, an Idaho corporation, Defendants-Respondents.	)	ORDER CONDITIONALLY DISMISSING APPEAL Supreme Court Docket No. 43724-2015 Bear Lake County No. CV-2013-232

An AMENDED NOTICE OF APPEAL was filed in the District Court on November 12, 2015, from the DECLARATORY JUDGMENT AND RULE 54(b) CERTIFICATE entered by District Judge Mitchell W. Brown and file stamped on November 16, 2015. The DECLARATORY JUDGMENT AND RULE 54(b) CERTIFICATE filed on November 5, 2015, contains legal analysis, a history of prior proceedings and, a Rule 54(b) Certificate was attached. The DECLARATORY JUDGMENT AND RULE 54(b) CERTIFICATE is not a final judgment as it does not comply with Rule 54(a) and should not have a Rule 54(b) Certificate unless part of the case is continuing at the District Court: therefore,

IT HEREBY IS ORDERED that the above entitled appeal be, and hereby is, CONDITIONALLY DISMISSED as it appears the Amended Notice of Appeal was not filed from a final, appealable district court order or judgment from which the Amended Notice of Appeal may be taken. Appellant shall be allowed TWENTY-ONE (21) DAYS FROM THE DATE OF THIS ORDER to obtain a final judgment or order from the District Court *or*, file a RESPONSE with this Court showing why this appeal should not be dismissed.

IT FURTHER IS ORDERED that further proceedings in this appeal SHALL BE SUSPENDED pending an Order of this Court.

DATED this 8th day of December, 2015.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Rodney Felshaw
District Judge Mitchell W. Brown

Entered on JSI
By: kg

DISTRICT COURT
SIXTH JUDICIAL COURT
BEAR LAKE COUNTY IDAHO
12/22/2015
DATE
TIME
KW
CLERK
DEPUTY
CASE NO.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ,

Plaintiff,

vs.

NIELD, INC.,
dba INSURANCE DESIGNERS,
an Idaho Corporation,
Defendants.

CASE NO. CV-2013-000232

JUDGMENT AND RULE 54(b) CERTIFICATE

JUDGMENT IS ENTERED AS FOLLOWS:

Declaratory Judgment is entered in favor of Defendant, Nield, Inc.

DATED this 22nd day of December, 2015.

Mitchell W. Brown

MITCHELL W. BROWN
Sixth District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 22nd day of December, 2015.

Mitchell W. Brown

MITCHELL W. BROWN
Sixth District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 23rd day of December, 2015, I mailed/served a true copy of the foregoing document on the attorney(s) / person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

ATTORNEY(S) / PERSON(S)

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Attorney at Law
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Montpelier, ID 83254

Facsimile (208)847-1230

Joseph T. Preston
ECHOHAWK LAW
P.O. Box 6119
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By Lan Tollbright
Deputy Clerk

STEVEN A. WUTHRICH, Esq.
Attorney at Law, ISB #3316
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiffs/Appellants.	SECOND AMENDED NOTICE OF APPEAL
v.	
NIELD, INC., dba INSURANCE DESIGNERS, an Idaho corporation. Defendant/Respondent.	Supreme Court Docket No. 43724-2015 Bear Lake County No. CV-2013-000232

TO: THE ABOVE NAMED DEFENDANT, Nield Inc., AND THE PARTY'S ATTORNEY, Joseph T. Preston, PO Box 6119, Pocatello, Idaho 83205, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Bret and Marti Kunz, appeal against the above named Defendant to the Idaho Supreme Court from: The Findings of Fact, Conclusions of Law and Memorandum Decision and Order entered in the above entitled action on the 31st day of August, 2015; the Declaratory Judgment entered September 18, 2015; the Declaratory Judgment and Rule 54(b) Certificate entered November 5, 2015; and the Judgment and Rule 54(b) Certificate entered December 22, 2015, Honorable Mitchell Brown presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to 11 I.A.R.,

Rule 54(b). This Court has appellate jurisdiction pursuant to I.C. §1-204.

3. I. Did the Court err in Bifurcating these Proceedings?

II. Did the Court err in making Conclusions of Law that are *non sequetor* from the Court's own findings?

III. Did the Court err in concluding that the parties had a separate contract with respect to Gem State when the parties themselves never identified any such separate contract?

IV. Did the Court err in construing the contract in favor of the drafter?

V. Did the Court err in construing the course of dealings as not indicated contingent commissions or profit sharing on the part of the contract when the Defendants themselves identified each and every payment as a contingent commission or profit sharing?

VI. Did the Court err in construing the contract to require only 50% be paid to Gem State based on ownership when that is contrary to the plain language of the agreement between the parties?

VII. Did the Court err in granting declaratory judgment only to Defendant when Defendant had stipulated to partial declaratory relief in favor of Plaintiffs on the eve of trial?

4. No order has been entered sealing all or any portion of the record.

5. Trial Transcript (already prepared); Transcript of hearing held 11/20/2014 is requested. Transcript of hearing on 11/5/2015 is also requested.

6. The appellees request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

7. All exhibits admitted or offered for admission; complaint filed 11/13/2013, Answer and Counterclaim filed 12/2/2013, Cross-Claim Complaint filed 12/2/2013, Motion for a

Protective Order filed 12/11/2013, Motion for Change of Venue filed 12/12/2013, Answer to Crossclaim filed 1/2/14, Reply to Counterclaim filed 1/2/14, Motion to Bifurcate and Stay Proceedings filed 1/31/14, Brief in Support of Motion to Bifurcate and Stay Proceedings file 1/31/14, Memorandum in Opposition to Motion to Bifurcate and Stay Proceedings file 2/24/14, Motion to Amend Reply and Answer to Crossclaim filed 3/11/14, Reply in Support of Motion to Bifurcate and Stay Proceedings file 3/11/14, Memorandum Decision and Order on Motion to Bifurcate and Stay Proceedings filed 3/26/14, Minute Entry and Order filed 4/17/14, Continued (Motion 11/20/14) Motion to Amend Answer Counterclaim & Crossclaim, Minute Entry and Order filed 11/14/14, Amended Minute Entry and Order filed 11/14/14, Response to Motion to Amend Answer and counterclaim filed 11/18/14, Tape of hearing on 11/19/14, Defendants Trial Brief filed 12/1/14, Trial Brief/opening statement filed 12/4/14, Joint Pre-trial Stipulation filed 12/5/14, Notice of Lodging of Transcript filed 2/13/15, Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed 3/3/15, Plaintiff's Closing Arguments filed 3/3/15, Defendant's Proposed Findings of Facts, Conclusions of Law and Order filed 3/17/15, Plaintiff's Reply Memorandum filed 3/23/15, Objection and Motion to Strike Plaintiff's Reply Memorandum filed 3/25/15, Findings of Fact, Conclusions of Law and Memorandum Decision and Order filed 8/31/15, Declaratory Judgment filed 9/18/15, Order on Nield, Inc's Memorandum of Costs filed 9/18/15, Tape of hearing held 10/5/15, Minute Entry and Order for hearing held on October 6, 2015 filed 10/7/15, Offer of Proof filed 10/15/15, Declaratory Judgment and Rule 54(b) Certificate and Minute Entry and Order, both entered on 11/5/2015; Judgment and Rule 54(b) Certificate entered December 22, 2015.

8. I certify:

a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been required as named below at the address set out below:

Name and Address: Rodney Felshaw,159 So. Main, Soda Springs, ID 83276

b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.

c. That the estimated fee for preparation of the clerk's record.

d. That the appellate filing fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 28 day of December, 2015.

Steven A. Wuthrich, Esq.

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing was mailed and/or sent by telefax this 28 day of December, 2015, to the following:

Joseph T. Preston
ECHOHAWK LAW
PO Box 6119
Pocatello, ID 83205-6119
BY MAIL

Rodney Felshaw
rodney.felshaw@gmail.com
BY EMAIL

Hon. Mitchell Brown
Fax: (208) 547-2147
BY FAX

Stephh

DISTRICT COURT
SIXTH JUDICIAL COURT
BEAR LAKE COUNTY IDAHO
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CASE NO.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ,

Plaintiff,

vs.

NIELD, INC.,
dba INSURANCE DESIGNERS,
an Idaho Corporation,
Defendants.

CASE NO. CV-2013-000232

JUDGMENT AND RULE 54(b) CERTIFICATE

JUDGMENT IS ENTERED AS FOLLOWS:

Declaratory Judgment is entered in favor of Defendant, Nield, Inc.

DATED this 22nd day of December, 2015.

Mitchell W. Brown
MITCHELL W. BROWN
Sixth District Judge

Joseph T. Preston
ECHO HAWK & OLSEN, PLLC
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Attorneys for Nield, Inc., dba Insurance Designers

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR BEAR LAKE COUNTY

BRET D. KUNZ and
MARTI KUNZ,

Plaintiffs,

v.

NIELD, INC., dba INSURANCE DESIGNERS, an Idaho Corporation

Defendant.

Case No.: CV-2013-232

DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT

COMES NOW, Defendant, Nield, Inc., an Idaho corporation, dba Insurance Designers, by and through its counsel of record, and hereby moves this Court pursuant to I.R.C.P. Rule 59(e) to alter or amend the Judgment filed on December 22, 2015 ("New Final Judgment"). This Motion is made upon the following grounds and reasons:

BACKGROUND

On December 8, 2015, the Idaho Supreme Court sent an Order Conditionally Dismissing Appeal ("Dismissal Order"). The Supreme Court raised issues with this District Court's Declaratory Judgment and Rule 54(b) Certificate, filed on November 5, 2015 ("Previous Final

Judgment"). The Dismissal Order informed Plaintiff-Appellant that he had twenty-one (21) days from the date of the Dismissal Order to obtain a more appropriate final judgment from the District Court or that Plaintiff-Appellant was to file a response with the Supreme Court. The consequence for failing to satisfy the Supreme Court with either of these actions appears to be the dismissal of Plaintiff-Appellant's appeal. The Supreme Court further ordered that further proceedings with the Plaintiff-Appellant's appeal would be "suspended pending an Order" from the Supreme Court.

On December 16, 2015, this District Court scheduled a status conference for December 17, 2015. At the status conference, the parties came before this District Court and were informed that after receiving the Supreme Court's Dismissal Order this District Court contacted the Idaho Supreme Court regarding the Dismissal Order and the District Court's Declaratory Judgment and Rule 54(b) Certificate. The District Court asked for the parties' input, and the parties discussed the matter with the Court. During this discussion, it was made known that the Plaintiffs-Appellants intended to file a Response Brief with the appellate court. The Court also made known that it planned to have further communication with the Supreme Court and address perceived deficiencies with the Previous Final Judgment.

On December 22, 2015, this District Court entered its New Final Judgment. The New Final Judgment reads in part, "JUDGMENT IS ENTERED AS FOLLOWS: Declaratory Judgment is entered in favor of Defendant, Nield, Inc." Based upon representations made by Plaintiff-Appellant to Defendant-Respondents outside of Court, it appears that the Idaho Supreme Court Clerk of the Court is satisfied with the New Final Judgment, and it appears that it is the Clerk of the Supreme Court's opinion that the New Final Judgment is an appropriate judgment, within the meaning of I.R.C.P. Rule 54(a).

Even though the Supreme Court appears satisfied with the District Court's New Final Judgment, there is uncertainty on what effect this New Final Judgment has on the Previous Final Judgment, and whether or not it was this District Court's intention to also address additional claims not previously addressed in the Court's Previous Final Judgment. Further it does not appear that the New Final Judgment is the most appropriate form of judgment under the Uniform Declaratory Judgment Act. The Defendant therefore brings this Motion to address these issues.

ARGUMENT

The Court should alter or amend the New Final Judgment because it is unclear what effect the New Final Judgment has on the Previous Final Judgment and the District Court's New Final Judgment is not the most appropriate method of judgment under the Uniform Declaratory Judgment Act.

I. IT IS UNCLEAR WHAT EFFECT THE NEW FINAL JUDGMENT HAS ON THE PREVIOUS FINAL JUDGMENT

With no other direction from the District Court besides that which was discussed at the December 17, 2015, status conference, the parties are left speculating on what effect the New Final Judgment has on the Previous Final Judgment.

It is unclear whether the New Final Judgment is an amended judgment of the Previous Final Judgment as provided under I.R.C.P. Rule 54(a)(2), whether it was the Court's intent to enter judgment on claims not previously addressed in the New Final Judgment, and whether the Previous Final Judgment has any legitimacy or whether the same is now invalid and void.

A. The New Final Judgment Does Not Appear to be an Amended Judgment

It does not appear that the New Final Judgment is an amended judgment of the Previous Final Judgment as contemplated by I.R.C.P. Rule 54(a)(2). The first evidence of this is that the title of the document is "Judgment" rather than "Amended Judgment." Also there was no order

entered by this Court prior to the entry of the New Final Judgment setting forth that the Court would be amending the Previous Final Judgment. Additionally, there is nothing from this court setting forth those terms of the prior judgment that remain in effect. I.R.C.P. Rule 54(a)(2).

If it was this Court's intention that the New Final Judgment be an amended judgment of the Previous Final Judgment then it would appear that no part of the Previous Final Judgment remains in effect because this District Court did not set forth any "terms of the prior judgment that remain in effect."

B. <u>It Appears that the New Final Judgment Enlarges the Scope of the Previous Final Judgment</u>

In Plaintiff's Complaint, he asks the Court to enter declaratory relief on three (3) separate points. The trial, in this case, was held on two (2) of those three (3) points, and the Court's Findings of Fact and Conclusions of law addressed those two (2) points. The Court's Previous Final Judgment squarely addressed those two (2) issues which were tried by Plaintiff. However, the Court's New Final Judgment is a simple statement that "Declaratory Judgment is entered in favor of Defendant, Nield, Inc." It appears that the Court is just treating the claim for declaratory relief as one single cause of action. A blanket judgment on all three items of declaratory relief prayed for appears improper since one (1) of those three (3) declaratory relief items was resolved by stipulation, and Nield, Inc. did not pray for declaratory relief in its favor. As will be more fully discussed below, the Court's New Final Judgment is improper because it merely grants declaratory judgment in Defendant's favor.

The District Court's New Final Judgment seems to have complicated the issues on appeal. In Plaintiff's Second Amended Notice of Appeal, he has raised for the first time on appeal, an issue with the Court's judgment as it relates to the third declaratory judgment issue.

An altered or amended judgment will help clarify what impact the New Final Judgment has on the Previous Final Judgment.

C. To the Extent that the New Final Judgment is not an Amended Judgment, the District Court appears to have exceeded its Authority by Entering the New Final Judgment

Ordinarily, the Idaho Appellate Rules Rule 13(b) limits that powers that a District Court has while a civil appeal is pending. One of those limited powers is to "(4) Rule on any motion to amend the judgment."

I.A.R. Rule 13.2 allows the appellate court to suspend an appeal by order, which order "will state the duration and any conditions of such suspension . . ." The Dismissal Order appears to be, at least in part, an I.A.R. Rule 13.2 Suspension of Appeal Order. The Dismissal Order states that "further proceedings in this appeal SHALL BE SUSPENDED pending an Order of this Court." The appellate court gave direction to Plaintiff to "obtain a final judgment or order from the District Court" within twenty-one (21) days from the date of the Dismissal Order. It is unclear whether the Dismissal Order expanded the limited powers of this District Court under I.A.R. Rule 13(b) to allow this District Court the ability to enter a judgment other than an amended judgment.

Because the Dismissal Order does not appear to grant any express authority for the District Court to enter anything other than an amended judgment, allowed under I.A.R. Rule 13(b), it appears that the only authority that the District Court would have is that which is enumerated in I.A.R. Rule 13(b). As discussed above, it does not appear that this Court was simply issuing an amended judgment by its New Final Order. However, if the New Final Judgment was an attempt by the Court to render judgments on claims stayed, it would seem that the Court did so without jurisdiction.

The Court should therefore help settle the uncertainty by granting Defendant's Motion and enter an order altering or amended the judgment.

II. THE DISTRICT COURT'S NEW FINAL JUDGMENT DOES NOT ADEQUATELY COMPLY WITH THE UNIFORM DECLARATORY JUDGMENT ACT

Surely, the District Court's New Final Judgment was the result of issues raised by the Dismissal Order. However, the New Final Judgment is not the most appropriate judgment under the Uniform Declaratory Judgment Act. The Court should issue a Judgment which declares the rights, status or other legal relations of the parties, even though a dismissal of the Plaintiff's claims may not be a fatal flaw.

A. This District Court should enter a Judgment that Declares the Parties Status under the Agent Contract

The Idaho Supreme Court case of *TracFone Wireless, Inc. v. State*, 351 P.3d 599 (Idaho 2015) is instructive. In *TracFone*, the trial court entered a partial judgment merely stating, "It is hereby ordered that judgment is GRANTED in favor of defendants/counterclaimants as to the declaratory relief claims and counterclaims of the parties." *Id.* at 602-03. The Supreme Court, in a footnote, stated:

> The declaratory judgment does not comply with Rule 54(a) of the Idaho Rules of Civil Procedure because it does not state "the relief to which a party is entitled." I.R.C.P. 54(a). "A document does not constitute a judgment merely because it states who will prevail in the lawsuit." *Harrison v. Certain Underwriters at Lloyd's, London*, 149 Idaho 201, 205, 233 P.3d 132, 136 (2010). . . . Because many trial judges were failing to comply with Rule 54(a), on February 12, 2015, this Court issued an order stating that "any judgment, decree or order entered before April 15, 2015, that was intended to be final but which did not comply with Idaho Rule of Civil Procedure 54(a) . . . shall be treated as a final judgment." The judgment in this case was entered on March 19, 2014, before that deadline. Therefore, the partial judgment in this case is treated as a final judgment. *Id.* at fn. 1.

In addition to the issues that the Supreme Court had with the partial judgment's failure to comply with I.C.R.P. Rule 54(a), the *TracFone* Court also took issue that the partial judgment "did not

set forth any determination of the construction of any applicable statute or declare the rights, status, or other legal relations of the parties under any statute." *Id.* at 603. When the Supreme Court ultimately decided whether to affirm or reverse the decision of the District Court, it was not the District Court's partial judgment that the Supreme Court affirmed. Rather, the Supreme Court looked to the substance of the information contained in the District Court's memorandum decision that declared the parties' rights and statuses under the Idaho statute at issue, and said "Assuming that was [the District Court's] intended declaratory judgment, we affirm the judgment on appeal."

This case is distinct from *TracFone* in that the District Court has gone beyond just ordering which party would prevail in its New Final Judgment and has issued a satisfactory Rule 54(a) Judgment. However, this case and the perceived deficiencies with the New Final Judgment are very similar to that addressed in *TracFone.* The application of the legal reasoning in *TracFone* that a declaratory judgment should actually "declare rights, status, and other legal relations" and not merely which side prevails is controlling in this case, so that the Court should amend the New Final Judgment with a judgment that adequately declares the rights of the parties.

Further, the approach of the Idaho Supreme Court to treat a Declaratory Judgment as an actual declaration of rights or other legal relations appears in harmony with the Uniform Declaratory Judgment Act as well as other persuasive authority. Idaho Code § 10-1201 Declaratory judgments authorized—Form and effect reads:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree. (emphasis added)

The plain reading of the statute reveals that Idaho District Courts have the authority to issue negative declarations as well as affirmative declarations, and such declarations have the effect of a "final judgment."

In *American Bldg. & Loan Ass'n, Inc. v. State of Alaska*, 376 P.2d 370 (Alaska 1962), the trial court entered negative declaratory relief from that which the Plaintiffs asked for in the complaint, even though the Defendants did not ask for any alternative declaratory relief in the pleadings. The Plaintiffs on appeal argued that the District Court had two alternative remedies which included either granting judgment in Plaintiffs favor or having Plaintiffs complaint dismissed. *Id.* at 373. The Alaska Supreme Court disagreed and said:

> Such is not the law in declaratory judgment actions. In some states, as in Oregon and Colorado for example, it is provided by statute that the declaratory judgment may be affirmative or negative in form and effect. (Citing *Dannells v. United States Nat. Bank of Portland*, 172 Or. 213, 138 P.2d 220, 232 (1943); *Bennett's Inc. v. Krogh*, 115 Colo. 18, 168 P.2d 554, 64 A.L.R. 1010 (1946)). We see no reason why the rule should be any different in the absence of a statute. Where upon the merits of the controversy the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action. (Citing *Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S.W.2d 786 (1928); *Northwestern Nat. Ins. Co. v. Freedy*, 201 Wis. 51, 227 N.W. 952 (1929)). In this way the purpose of a declaratory judgment will be realized, namely to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.' (Citing 1 Anderson, Declaratory Judgments § 3 at 12 (2 ed. 1951)). *Id* at 373.

As discussed above, the Uniform Declaratory Judgment Act, which Idaho has adopted, states that a "declaratory judgment may be affirmative or negative in form and effect." *American Building* 376 P.2d 370, lends credence to the fact that an Idaho District Court should actually enter a declaration of rights rather than merely stating which party proved successful on the Declaratory Judgment action.

Defendant submits that the proposed Amended Judgment and Rule 54(b) Certificate attached hereto as Exhibit A, would be an appropriate judgment that declares the parties rights and status under the contract in dispute.[1]

B. Although Less Appropriate, Alternatively, the District Court may Dismiss claims for Declaratory Judgment

A Court's dismissal of a claim for declaratory judgment rather than a negative declaration is not a fatal flaw, should the trial court's findings and order clearly define the rights of the parties. *Brown v. State of Minnesota*, 617 N.W.2d 421 (Minn. Ct. App. 2000).

In *Ketterer v. Independent School District No. 1 of Chippewa County*, 79 N.W.2d 428 (1956), the trial court's judgment merely dismissed the plaintiff's complaint which contained a claim asking for declaratory relief. The Minnesota Supreme Court stated:

> The judgment in better from (sic) should have declared the rights of the parties in conformity with findings and conclusions of law. The declaration may be either affirmative or negative in form and effect. However, since the court's findings of fact, conclusions of law, and order for judgment resulting in a dismissal herein operates as an adjudication upon the merits, the failure to declare the rights of the parties on the state of the record in this case is, we think, here without prejudice and not reversible error. See *State, by Burnquist, v. Bollenbach*, 241 Minn. 103, 63 N.W.2d 278; Wright, Minnesota Rules, pp. 294, 295. Since the trial court's findings and order clearly defines the rights of the parties, we therefore do not find it necessary upon the particular facts of this case to order a modification of the judgment as entered. *Id.* at 440

While it may not be in error for this Court to merely dismiss the Declaratory Judgment claims contained in Plaintiff's complaint, this Court did not dismiss the declaratory judgments. Rather, the New Final Judgment entered declaratory judgment in Defendant's favor.

[1] Number 2 of the proposed Amended Judgment and Rule 54(b) proposes that the Court dismiss the Plaintiff's count 2 claim for declaratory relief with prejudice. Dismissing count 2, which sought a declaratory judgment that the amount of remuneration due for profit sharing, bonuses, and/or contingent commission was 80%, is appropriate where the Court determined that the contract did not create a duty for paying bonuses, profit sharing, or contingent commissions. The dismissal of this count seems more appropriate where count 2 appears to rest in large part on count 1 and if the Court were to enter a negative declaratory judgment, it would appear to be in large part a mere duplication to that which it is proposed that the Court enter on number 1.

This appears to be an error of the Court. The more appropriate route appears to be dismissing the claims brought by Plaintiff against Defendant.

CONCLUSION

The Court should grant Defendant's Motion to Alter or Amend the New Final Judgment in order to help clarify the Court's intended results with issuing the New Final Judgment and to bring the New Final Judgment in conformity with law.

DATED this 4th day of January, 2016.

Joseph T. Preston

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 2016, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Steven A. Wuthrich Attorney at Law 1011 Washington St., Suite 101 Montpelier, ID 83254	☐ U.S. Mail ☐ Hand Deliver ☒ Fax: (208) 847-1230 ☐ Email:
Honorable Mitchell W. Brown 159 South Main Soda Springs, ID 83276	☐ U.S. Mail ☐ Hand Deliver ☒ Fax: (208) 547-2147 ☐ Email:

For ECHO HAWK & OLSEN, PLLC

H:\WDOX\CLIENTS\1264\0001\00060550.DOC

EXHIBIT A

Joseph T. Preston
ECHO HAWK & OLSEN, PLLC
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Attorneys for Nield, Inc., dba Insurance Designers

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ and
MARTI KUNZ,

Plaintiffs,

v.

NIELD, INC., an Idaho Corporation dba
INSURANCE DESIGNERS,

Defendant.

Case No.: CV-2013-232

AMENDED JUDGMENT AND RULE 54(b) CERTIFICATE

JUDGMENT IS ENTERED AS FOLLOWS:

(1) The agent contract between Plaintiff Bret Kunz ("Bret") and Defendant Nield, Inc., an Idaho Corporation dba Insurance Designers ("N.I.") does not include a duty for bonus commissions, incentives, or profit sharing.

(2) Count two (2) of Bret's claim for declaratory relief is dismissed with prejudice.

DATED this _____ day of January, 2016.

MITCHELL W. BROWN
Sixth District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules

DATED this _____ day of January, 2016.

MITCHELL W. BROWN
Sixth District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of January, 2016, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Steven A. Wuthrich Attorney at Law 1011 Washington St., Suite 101 Montpelier, ID 83254	☐ U.S. Mail ☐ Hand Deliver ☐ Fax: (208) 847-1230 ☐ Email:
Joseph T. Preston ECHO HAWK & OLSEN, PLLC PO Box 6119 Pocatello< ID 83205-6119	☐ U.S. Mail ☐ Hand Deliver ☐ Fax: (208) 547-2147 ☐ Email:

By: _____
Deputy Clerk

H:\WDOX\CLIENTS\1264\0001\00060567.DOC

STEVEN A. WUTHRICH, Esq.
Attorney at Law, ISB #3316
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Montpelier, Idaho 83254
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Fax: (208) 847-1230

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiffs/Appellants.	OBJECTION TO DEFENDANT'S MOTION TO AMEND
v.	Supreme Court Docket No. 43724-2015
NIELD, INC., dba INSURANCE DESIGNERS, an Idaho corporation. Defendant/Respondent.	Bear Lake County No. CV-2013-000232

COMES NOW Plaintiffs Bret and Marti Kunz, and hereby object to the Motion to Amend the Judgment, inasmuch as any amendment to the Judgment would risk that the Judgment will not be deemed as final and the appeal presently paid for and pending would be dismissed.

Dated this 12 day of January, 2016.

Steven A. Wuthrich, Esq.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was mailed and/or sent by telefax this 12 day of January, 2016, to the following:

Joseph T. Preston
ECHOHAWK LAW
PO Box 6119

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRET D. KUNZ and MARTI KUNZ,)
Husband and Wife,)
Plaintiffs/Appellants,) Supreme Court No. 43724
vs.) Bear Lake County No.
NIELD, INC., dba INSURANCE) CV-2014-232
DESIGNERS, an Idaho)
corporation,)
Defendant/Respondent.)
_____)

REPORTER'S TRANSCRIPT ON APPEAL

Appealed from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, in the City of Paris, Idaho.

Honorable Mitchell W. Brown
District Court Judge

Reported by
Rodney M. Felshaw
Certified Shorthand Reporter

IN THE SUPREME COURT OF THE STATE OF IDAHO

Lodged at the Bear Lake County Courthouse in Paris, Idaho, this 9th day of February, 2016.

Cindy Garner
Clerk of the Court

By: _____
Deputy Clerk

IN THE SIXTH JUDICIAL DISTRICT COURT
BEAR LAKE COUNTY, STATE OF IDAHO
*****

BRET D. KUNZ and MARTI KUNZ,)
Husband and Wife,)
Plaintiffs,)
vs.) Case No. CV-2013-232
NIELD, INC., dba)
INSURANCE DESIGNERS,)
an Idaho corporation,)
Defendant.)
*****

BENCH TRIAL
DECEMBER 8, 2014
HONORABLE MITCHELL W. BROWN
(Volume 1 of 2.)
*****

APPEARANCES:
For the Plaintiff: Mr. Steven A. Wuthrich
Attorney at Law
For the Defendant: Mr. David A. Hooste
Attorney at Law
*****

INDEX OF WITNESSES:

THE COURT: Good morning. We'll be on the record in the matter of Bret Kunz versus Nield Insurance. And Marti Kunz versus Nield Insurance and Insurance Designers. This is Bear Lake County case CV-2013-232.

The plaintiffs are present with counsel, Mr. Steven Wuthrich. Defendant's counsel is present. Mr. Hooste, would you please identify the representative that's here with you.

MR. HOOSTE: Bryan Nield, B-r-y-a-n. He's the co-owner of Nield Insurance.

THE COURT: And I know Mr. Wuthrich's clients and they are the named plaintiffs in this matter, but would you please identify and introduce your clients as well.

MR. WUTHRICH: Yes, Your Honor. Bret Kunz is to my left and Marti to my right.

THE COURT: All right. Welcome today. We're on the first day of a bifurcated trial in this matter. This matter is bifurcated for a trial today and tomorrow on the declaratory judgment portions of the complaint filed by the plaintiff in this matter.

The court has received submissions from the parties as far as trial briefs and opening statements in this matter. It is my practice in court trials to dispense with opening statements and get right to the evidence. That's what I intend to do in this case, based

upon the trial briefs that have been submitted.

I should note for the record that in response to Mr. Wuthrich's trial brief and opening statement, I did receive a motion in limine to strike the plaintiff's trial brief and opening statement. I have reviewed that. I also received a memorandum from the plaintiff opposing that motion in limine.

Mr. Hooste, let's take a brief moment this morning and address that motion in limine before we proceed to evidence.

MR. HOOSTE: I'll try and be as brief as I can. I realize that the court has a lot of latitude in regard to an opening statement. And frankly, in regard to the hearing that we had, I want to say about a week or 10 days prior to the due date for the opening statement, this court expected them to be entered simultaneously. To me, I think that that was appropriate.

Part of my concern is that the defendant submitted a trial brief in this case and then the plaintiff was able to have that as an advantage. But that's kind of a side issue, I guess.

As I read the briefs, I think we're pretty close on the law. I don't know that we disagree, quite frankly, in terms of what law applies for the most part. The thing that I think gives me the most trouble, really,

is in the trial brief is the first time that we see the plaintiffs alleging the issue of an implied in fact contract.

THE COURT: What page are you on in their trial brief?

MR. HOOSTE: Page eight, Your Honor, the last full paragraph. It talks about an implied in fact contract and talks about performance. Basically I guess I'm reading this in a pretty open and general way, but the way I read that it seems to say that we're looking at a course of performance not so much as interpreting the face of the contract that we're looking at, but in terms of a modification of the contract.

Your Honor, I realize that this court -- I went back and reviewed this court's ruling on its motion, or on the memorandum with regard to the change of venue and with regard to the bifurcation. I looked at those and this court cites to the Carello case and the Mortensen case. These cases that talk about how to interpret Idaho Rule of Civil Procedure 8(a)(1). What we're really looking for is a concise statement of the facts and that someone is not forbidden from raising those.

This court in essence found, in its memorandum for change of venue, that there was in fact a breach of contract pled. Well, I think even that is looking at the

complaint that was issued in a pretty broad light. There was never any amendment to the complaint that I saw. As we stand here today, really we have a declaratory judgment. And as I look at the complaint, and as this court noted in its own prior decisions, what it focuses on, or what you can garner, I guess, from the factual allegations of what the plaintiff is pleading, is that there is an 80/20 commission split and that there's another functions provision that justifies -- that they rely upon for their suit.

There isn't anything that I found in the complaint that says it's not separated into a different account. There was no count three breach of contract, even though this court found that. But there's no outline, if you will, for how we get to something like an implied in fact contract.

I'm looking in Rule 8(a)(1) in the Rules of Civil Procedure and there are cases that still say you need a clear and concise statement of the facts. But in the comment regarding Brown versus City of Pocatello, a 2010 case, 148 Idaho 802, in that case the homeowner alleged that her home was flooded as the result of a road construction project performed by the city. The complaint was not separated into a multiple cause of action. The only theory for recovery identified was negligence. It

failed to include a statement of claims for nuisance and adverse condemnation and so they weren't able to bring those other issues.

I think at some point in time we have to look at the complaint and say there's a limit to this. As a defendant we have to be able to say what is it that we're defending. This court has already expanded it beyond the declaratory judgment to say, all right, I'm going to read it broadly enough to say that there's some form of breach of contract because they plead for damages. But other than the notice that we're put on as to what it is that they think we did wrong or that they are owed, the other items go to the accounting, go to potential damages. I guess this court's findings in the change of venue haven't been challenged, yet I don't know that they were certified under Rule 54(e).

THE COURT: They were not.

MR. HOOSTE: So those are unchallengeable at this point in time. I think that getting into new causes of action, where there's no amended complaint, where it hasn't been asked to be amended before, is really my concern.

So one of two things. I think this court should limit the evidence today to the allegations that were pled, or grant me substantial latitude with regard to

potential defenses. I looked in Rule 12(g) and I think the one defense that I can see that is clear with regard to modification, and which, again, hasn't been pled, but if it's allowed the defense would be the statute of frauds.

Now, under 12(g), to me that would fit under a pleading that fails to state a claim upon which relief can be granted. The relief is going to be denied because you can't enforce a contract if it can't be completed within a year and if it's not in writing. If you'll give me a moment. Okay. That's under Idaho Code 9-5051.

I don't believe that the defense has been put on sufficient notice of a pleading that requests a modification. If this court expands the allowable evidence, then I would ask the court to likewise expand the allowable defense, or disallow it in its entirety.

THE COURT: Thank you, Mr. Hooste. Mr. Wuthrich.

MR. WUTHRICH: I'm somewhat confused. We certainly did have the issue of modification of the contract at issue with respect to subsection C that's now been dismissed, or stipulated to be dismissed with prejudice. So that clearly was raised from the get-go.

THE COURT: Just a minute. What do you mean subsection C?

MR. WUTHRICH: The part about the life and health

that was dismissed. The counterclaim, the crossclaim, against Marti Kunz seeking damages for the life and health. We pled that from the beginning, but that's been dismissed. That's not part of this.

I believe what I'm talking about there is a course of performance as relates to the interpretation of what the parties intended the contract to mean.

THE COURT: So you don't believe you're asserting an implied in fact contract?

MR. WUTHRICH: No. I think that case was probably a U.C.C. case. That's probably why it talked in those terms. I was just pointing out that a course of performance is something that the courts look to for interpretation of contracts.

THE COURT: When there's an ambiguity?

MR. WUTHRICH: Yes. I don't think I've started a whole new cause of action based on that. I just think that points to what the parties thought the contract meant from the onset. If that's the way they're reading it, I think that's probably reading it too broadly.

Other than that, I think -- I have not read their trial brief but I don't think we're very far apart on what the law is, other than just how it applies in these circumstances.

Oh. And I apologize for it being late, but

I've been hampered of late in trying to keep up with my calendar. Thank you.

THE COURT: Thank you. I think that it's appropriate for Mr. Hooste and the defendant to raise this issue in light of the reference or citation to the implied in fact contract and citing to a case Homes by Bell-Hi, Inc., vs. Wood, which is apparently a case that dealt with a contract implied in fact in that matter.

As we all know, pursuant to Rule 15(b) of the Idaho Rules of Civil Procedure, a party can move to amend their pleadings to have the pleadings conform to the evidence. I think what Mr. Hooste is doing here is trying to prevent there being any argument or suggestion that he tried -- that the issue of a contract implied in fact was tried to the court with his consent and therefore afford the plaintiffs an opportunity to make a motion at the conclusion of trial to amend their complaint to conform with the evidence presented in trial and that there be some implicit agreement on the defendant's part that they did agree to try that contract implied in fact case based upon the evidence that was submitted in trial.

The court has previously interpreted, as Mr. Hooste indicated, that the complaint, under a notice pleading standard in Idaho, does set forth a complaint for a claim of breach of contract in this matter. The court

previously found that Mr. Wuthrich previously argued that despite the headings in the complaint, they certainly intended to assert a cause of action for breach of contract. I think, in applying and reading the entirety of the complaint, that there was a complaint for breach of contract asserted in the initial complaint.

I haven't reviewed the complaint in detail in anticipation of an assertion of an implied in fact cause of action in that contract. Based upon Mr. Wuthrich's statements here today on the record, it does not sound as though he's asserting that there is an implied in fact contract or a cause of action that has been asserted by the plaintiffs for an implied in fact contract in this matter. Rather, he argues that he cited to those decisions for the purpose of assisting in his argument that if there are ambiguities or vagaries in the contract in question, the court can look to extrinsic or parol evidence to determine what the parties' intent in formulating and drafting that contract was. And that the parties' course of dealings would be one of those factors the court would look to.

The court is going to state on the record here today that any -- that the plaintiff has indicated that there is no intent to assert a cause of action for an implied in fact contract. The court will consider

extrinsic evidence for the purpose of determining what the parties' intent is, what the course of dealings may have been to assist with the interpretation and understanding of that contract as it relates to any ambiguities associated with that contract. I will not consider the same in the light of a breach of an implied in fact type of contract or the establishment of an implied in fact contract.

I don't know that there needs to be a ruling on that per se, because Mr. Wuthrich has indicated that that is not his intent, but the court will construe and review the evidence in light of a cause of action for breach of contract and for no other purposes. And the court is intending to pursue this declaratory judgment component of these bifurcated proceedings to ascertain and determine what that contract language is and what those terms and conditions of the contract are as set forth in the parties' contract.

That will be the order and ruling of the court at this time. Mr. Hooste, any questions or concerns about that?

MR. HOOSTE: Your Honor, I guess my only concern, and this is almost getting to the point of splitting hairs, but where you've already indicated that you intend to look at extrinsic evidence to determine what the

parties meant, I think both of us, and I hope I'm not speaking out of turn, but I think both of us expect to present all of the extrinsic evidence that is potential today. But I think this court, after hearing all of the evidence, will need to, in and of itself, the way the ambiguity law is, determine if there's a patent ambiguity or latent ambiguity.

If you find that there isn't a patent ambiguity, or that there's not a latent ambiguity, sorry, you would look at the four corners and make your decision. So while I realize that you're going to hear all of the extrinsic evidence, I don't think that -- I would ask the court to make it clear that you're not finding that the extrinsic evidence is automatically, at least at this point in time, determinative.

I realize that's a pretty --

THE COURT: I think I understand what you're saying. I think that that is an issue that will have to be sorted out in my findings of fact.

MR. HOOSTE: Okay. I totally expect us to put on everything rather than a little bit here and a little bit there.

THE COURT: Understood. Any concern or question about the court's ruling on that, Mr. Wuthrich?

MR. WUTHRICH: No, Your Honor.

THE COURT: With that, then, at this time, Mr. Wuthrich, you may present your first witness in this matter.

MR. HOOSTE: May I take up one other matter?

THE COURT: You may.

MR. HOOSTE: We've already kept our witnesses out of the room at this point in time, but we haven't had any formal motion to exclude.

THE COURT: Didn't I talk about that at the pretrial? I normally do, about Idaho Rule of Evidence 615 and my standard order excluding witnesses.

MR. HOOSTE: If you did, I don't recall it.

THE COURT: It may have gotten past me. I do have a standard order. I don't even require that the parties make the motion. If I neglected to -- I usually cover that in the pretrial conference, but where we did it by phone, which was a little bit different, I might have forgotten to do that.

MR. HOOSTE: You may have covered it. We have a kind of different situation. In the pretrial we talked about Marti's claim being dismissed as a plaintiff. I didn't object to that. It seemed to not frankly make a lot of difference except for right now. Where Marti is a person of interest only because she's -- has an interest in Bret's community property, I think was the way it was

decision at that time it remands back to Your Honor, to this court.

THE COURT: If it helps you with that concern, I do know and can tell you that Chief Justice Jones has been in discussion with Mr. Kenyon regarding this issue. I have had that discussion with Mr. Kenyon. So this isn't Mr. Kenyon making the determination, the Supreme Court is making these determinations at this point in time, for whatever that is worth.

MR. PRESTON: So I'm clear, it's not Mr. Kenyon that kicked it back, it's the Supreme Court that actually took issue with this court's decision, or this court's previous final judgment?

THE COURT: What I will tell you, for what it's worth, when I got the order conditionally dismissing the appeal, I called the Supreme Court. I spoke with Mr. Kenyon and he said I need to go and talk to Chief Justice Jones. He came back to me and we had further discussion. This is what I was directed to do. So whether or not it was Mr. Kenyon that initially made that determination or not, I don't know. I do know that he's been acting in concert, since my telephone conversation, with Chief Justice Jones.

MR. PRESTON: Your Honor, may I ask, was it specifically how you entered the judgment, was that the

specific direction on how you were given to enter the judgment, or was it just a broad parameter on this is how we suggest you do it.

THE COURT: I was given instructions on what to do. I followed them in part. The part I didn't follow was they told me not to do it as a 54(b) certificate. I can't see how I can in good faith not enter a 54(b) certificate in this case where it's clearly not a final adjudication of all the issues. I followed their instructions to the best of my understanding and to the best of my ability, other than disregarding their instruction to not attach a 54(b) certificate, because it clearly wasn't an adjudication of all of the issues in this litigation.

MR. PRESTON: I can see how that is a difficult position to put the court in. It appears that the court, and correct me if I'm wrong, but probably agrees with our position in light of the Tracfone decision and it's previous judgment that it entered, which is consistent with the mandatory case law.

THE COURT: I'm certainly in agreement and I am looking for some direction from the Supreme Court on this. I expect I'll probably see that in the appeal decision that comes down. I see this as being an issue that I certainly invite a discussion from them on how to properly posture an interlocutory appeal on a declaratory judgment

issued by a court. Then obviously I expect I'll hear from them on the merits of my findings of fact and conclusions of law.

So I'm actually looking forward to this appellate decision, not only to affirm or overrule my findings of fact and conclusions of law, but to give me, and hopefully other judges, greater understanding of how we go forward on a declaratory judgment action such as this, and such as in Tracfone, and not run afoul of the rules on final judgments and interlocutory appeals on 54(b) certificate. I think it will be a much needed and appreciated decision.

MR. PRESTON: Your Honor, I agree with that. It seems to me that there's some inconsistencies from the Supreme Court.

I guess the other portion of our motion is asking for clarification. What effect the final judgment, this new final judgment, has on the previous final judgment. And whether or not it contemplates exceeding those issues that were addressed at trial and in the previous final judgment.

THE COURT: I hope my previous minute entry and order and pronouncements are clear. In my mind the only thing that is being granted permissive appeal on is the issues that were litigated in trial and my findings of

fact and conclusions of law. I understand that there are other issues unresolved in this case. I understand that there are other issues that have been dismissed, such as your counterclaim, such as another element of Mr. Wuthrich's declaratory relief. None of those were litigated in that trial. None of those were the subject of my findings of fact and conclusions of law. I expect the appeal addresses only those limited issues that I certified for appeal and only those limited issues that are addressed in my findings of fact and conclusions of law. That's the way I've always viewed it and always tried to posture it.

MR. PRESTON: Thank you, Your Honor. I expected as much. However, it was less than clear.

THE COURT: I agree. That is the risk when your judgment is just a one sentence judgment as opposed to being able to declare the rights of the parties, which I attempted to do in the first judgment. Hopefully the Supreme Court, or if it's the Court of Appeals, will give us the guidance that is necessary on those issues as part of this.

I'll hear any further argument you have, Mr. Preston, but at this point in time, I'll be honest, my inclination is to let this matter run its course. Hopefully we'll receive instructions from the Supreme

MR. HOOSTE: I would object. I don't believe it's relevant to the declaratory judgment. It doesn't go to the contract between Nield, Inc. and Mr. Kunz. It's a separate contract between a party who is not a party here.

THE COURT: Mr. Wuthrich.

MR. WUTHRICH: Well, Your Honor, he purchased one half of the P&C book from Mike's widow, as well as the life and health in its entirety. This is how he accomplished that. This is how he became a one-half owner. The contract at issue talks about the fact that they are 50/50 owners. This is how he became a 50/50 owner of the P&C.

THE COURT: All right. I think historically and chronologically it does have some relevance. I'll overrule the objection and allow the admission of 128.

Q. (BY MR. WUTHRICH) While on the subject, what is a book of business?

A. It would be the evaluation of the commission paid on the book. Probably averaged over -- it's based on a year, but if you were buying a book of business you would probably take a three to a five year average to make sure that you were getting a proper representation of what that book was generating for commission.

Q. And just for the record, assuming we're not dealing with people who are in the insurance industry each

day, is the book of business like a customer list?

A. It would have a customer list along with the written premium and also the earned premium.

Q. So the written premium is that what is typically referred to as residuals?

A. The written premium is the gross premium I would collect from a client. The residuals would be what the commission would be paid from the insurance company on the written premium.

Q. Okay. But that's on premiums that have already been in place, correct?

A. Yes.

Q. Is that distinguished in the insurance industry from new business?

A. No. Once that policy is written it does become part of the book of business.

Q. Okay. So in addition to purchasing the business from Judy Kunz, did you do anything else as a part of taking over Mike's business?

A. I then became the owner. Then I proceeded as the owner of the agency to take care of payroll, setting hours for the employees.

Q. Did you enter into any new contracts with the defendant?

A. I did.

Q. Okay. I'd like you to go through the process that caused you to enter into the new contract that you entered into with the defendant.

A. After we agreed -- after they suggested that we purchase the business from Judy, the old contract would no longer apply that I had signed with them as I didn't have any ownership clause in that. So we needed a new contract that would include that ownership clause.

Q. And how did the negotiations take place or what happened to facilitate the entering into a new contract?

A. I'm not quite understanding what you mean.

Q. Did you at any point see a draft of what was going to be the new contract?

A. Yes.

Q. Can you say when?

A. It would probably have been in October.

THE COURT: Of what year?

THE WITNESS: Of 2008.

Q. (BY MR. WUTHRICH) And who reviewed that draft?

A. Well, Bryan brought it down to our office. He sat it down in front of Marti and I. Marti looked at it closely. I looked at it closely. And then he said if we were okay with it, he would take it back and put it on his letterhead.

Q. And is that draft what has been referred to as -- what is marked and admitted as exhibit 103?

A. Yes.

Q. You did read that contract carefully?

A. I did. Originally when we spoke with Bryan he says we'll just sign the same contract that you had with Mike. This appeared to us, when we read it, to mirror the contract that was with Mike.

Q. Okay. And subsequently did you enter into a written contract that did have their letterhead on it?

A. I did.

Q. And when did that take place?

A. It probably would have taken place the end of October, into November. I don't know for sure.

Q. The contract doesn't have a date on it, but says it's effective January 1 of 2009; is that correct?

A. Yes.

Q. And that contract for you is exhibit 105; is that correct?

A. Yes.

Q. For your wife, that contract is exhibit 104?

A. Yes.

Q. Other than the fact of one for you and one for your wife, and who are the witnesses, those two contracts are actually identical; isn't that correct?

A. It's charged back.
Q. All right. In your relationship with Nield, Inc., I believe the contract calls for them to do all the accounting; is that correct?
A. It does. That would make sense where they do the contracting with the companies. They are privy to all of that information. So for them to do the accounting would be a course of conduct, a logical one.
Q. So you receive your commissions from Nield, Inc.?
A. I do.
Q. Okay. Let's talk about some other things. What is a contingent commission?
A. A contingent commission is another level in the line of commissions, where the company sets up certain guidelines that you would have to meet. How many losses were paid out, how much was paid out in losses, whether you had an increase in written premium. So when you meet those guidelines, you get a contingent payment based on the written premium.
Q. Okay. Contingent commission is also predicated on the written premium?
A. It is. It's a factor in how much you're going to collect on the contingent commission.
Q. But you might not qualify with any given

company in a given year for that?
A. Yeah. If you have a big loss, like I believe it was in 2009 with Gem State, I didn't qualify because my loss ratio was too high.
Q. Okay. And what is a profit sharing payment?
A. A profit sharing and contingent commission mirror each other. You'll see those terms interchanged within the same companies. Some companies refer to profit sharing and some refer to contingent commission. They are basically the same thing.
Q. Okay. We talked earlier about the profit sharing payments that were talked about at the time of signing the contract. Did the defendant's agents have further conversations with you about profit sharing payments?
A. Yes. There was another time when Marti and I were down in the Pocatello office. I can't remember exactly what we were discussing, but Bryan and I went into his office, that used to be Tom Nield's office, to look something up. He was trying to motivate me and he made the comment of how nice the profit sharing checks were.
Q. And did you look forward to those profit sharing checks?
A. Yes.
Q. Okay. Let's talk about how are profit sharing

checks paid?
MR. HOOSTE: I'm going to object at least on foundation as far as this profit sharing. We don't have any time frame for that.
THE COURT: Okay. Sustained at this time. I'll require additional foundation.
Q. (BY MR. WUTHRICH) When did that conversation occur?
A. It would have been probably between November and February of that year. It was prior to me receiving my first profit sharing.
THE COURT: November and February would be in different years.
THE WITNESS: November of 2009 -- 2008, and February of 2009.
Q. (BY MR. WUTHRICH) Okay. So it was after the signing of the contract in this case?
A. Yes.
Q. But within a few months?
A. Yes.
Q. And that took place in Pocatello?
A. It did.
Q. Was anyone else in the room besides you and Tom?
A. No. It was Bryan Nield, but it was in Tom's

old office.
Q. Bryan. Sorry.
A. But in Tom's old office.
Q. I got that confused. Okay.
THE COURT: So that conversation was with Bryan Nield, not Tom?
THE WITNESS: It was with Bryan Nield.
Q. (BY MR. WUTHRICH) So we have that cleared up. Tom used to own Nield, Inc., correct?
A. Yes.
Q. And Bryan Nield bought out Tom Nield; is that correct?
A. Yes, as far as I know.
Q. About this same time; isn't that correct?
A. That's what I have been told.
Q. You used to have dealings with Tom Nield, correct?
A. It would be here and there. It would be mostly on the accounting issues.
Q. But since you entered -- at the time you entered into this contract your dealings were solely with Bryan?
A. Yes.
Q. Okay. And from that time forward they've always been just with Bryan?

A. Yes.
Q. Does it bear any relationship to any of the numbers that you were able to ascertain on the 629?
A. No. There's no mathematical sense to it. It's like it's just a random number picked out of the air.
Q. Okay. Did you believe, at the time you received this, you were receiving your appropriate share of the profit share?
A. I believed I was.
THE COURT: You said you believed you were.
MR. WUTHRICH: I think I can clear that up.
Q. (BY MR. WUTHRICH) With regard to Gem State, did you have access to all of the numbers as to what went in to calculating and paying a profit sharing payment?
A. Yes. The first year I received a memo that Greg had wrote on it. In the following years Gem State would mail me the check so I had the numbers in front of me. I would scan it into my system and then forward that check to Nield, Inc. and they would split that out and mail me my share.
Q. Okay. So with regard to Gem State, where you had access to the numbers and you mailed the check to Nield, you always received 50 percent any year that you qualified for a profit sharing payment, correct?
A. Except for one year where he did split it

80/20.
Q. We'll get to that. With respect to the other companies, and let's identify who they are. Who are the other companies that made payments of profit sharing or contingent commissions?
A. Farmers Alliance, Acuity, and Allied.
Q. And with respect to those companies, did you have access to the information as to how much profit sharing was paid?
A. No, I did not.
Q. When did you finally gain that access?
A. Not until we subpoenaed it from the companies.
Q. So that would be after this lawsuit was filed?
A. Yes.
Q. And so since then you've had an opportunity to ascertain how much profit sharing was paid in each year or contingent commission?
A. Yes. I know Acuity and Farmers Alliance. We didn't subpoena enough information from Allied that I could make an accurate calculation.
Q. Okay. Have you been paid any contingent commission on Allied?
A. None.
Q. Okay. So that company you still don't have enough information to ascertain what was paid?

A. No, I don't.
Q. You have enough to ascertain what was paid or your percentage?
A. What my percentage is. I knew there were payments on it, contingent commission paid with that company, but I can't ascertain exactly what my share would be.
Q. Okay. In order to do that you need to know how much written premium you had compared to Tom Nield?
A. To Bryan. To Nield, Inc. But Allied broke it out differently. Like Farmers Alliance included both commercial and personal, where Allied broke that out separately. So I don't have the written premium differences on the commercial and I can't make an accurate calculation.
Q. Okay. But you do know contingent commission payments were paid?
A. I do.
Q. Okay. Let's move now to exhibit 108. Is this a letter that you sent to Bryan Nield?
A. It is.
Q. And is it a true and -- we've already admitted it. In that one you were still arguing with him over the proper way to speculate the profit sharing; is that correct?

A. Yes. I felt like that with the contract language I should get 80 percent of the contingent commission.
Q. So you were unaware, until after this lawsuit was filed, that he was maintaining you shouldn't get any profit sharing?
A. The first time I heard that was after that, yeah.
Q. Let's turn now to what is marked as exhibit 109. What is that exhibit that's been admitted?
A. That is the response to my letter asking for the 80/20 split.
Q. And this was paid in 2013, but it's for the 2012 year?
A. Yes.
Q. And so ultimately did he in fact pay you 80 percent on Gem State for 2012?
A. He did.
Q. Okay. Just for the record, contingent commissions are paid how often?
A. They are collected once each year, at the end of the year. Being paid will determine on whether you qualify.
Q. But generally is it at the beginning of the next year?

today you indicated that you had been 18 years employed in the insurance field?
A. Yes.
Q. And you're starting that as of 1996?
A. Yes.
Q. Okay. And is Nield, Inc. the only general agent with whom you've had a subcontractor contract?
A. Yes.
Q. And I guess Insure Bear Lake, Inc. is another company that you are part owner in, correct? And it's not Nield, Inc.?
A. Insure Bear Lake would be considered our insurance agency.
Q. Okay. So that's your agency. You have in essence divided that agency between insurance that Marti writes, health and life, and you keep your property and casualty insurance under Nield, Inc., am I correct in that?
A. Yes. But the payments that come from Nield, Inc. come to Insure Bear Lake Incorporated.
Q. So accounting wise, within your office that you have set up, there isn't a bright line or a clear distinction between Insure Bear Lake, Inc. and Bret Kunz as an individual; is that what you're saying?
A. I didn't follow the question.

Q. All right.
A. Try one more time.
Q. I think you just testified that in essence Insure Bear Lake, Inc. is your agency. In other words, it's the equivalent of your office?
A. Okay.
Q. The Montpelier office is Insure Bear Lake, Inc. doing business as Insurance Designers?
A. Yes.
Q. Okay. So if Nield, Inc. sends something to Insure Bear Lake, Inc., and it's your part of a commission, that wouldn't be completely abnormal; is that correct?
A. That would be the standard course of business.
Q. Okay. So yours is limited to property and casualty policies through Nield, Inc.; is that correct?
A. The policies I write I do receive some commissions off of a health insurance that's still on the books from me buying it from Mike's widow.
Q. But that's separate from Nield, Inc.?
A. Yes.
Q. All of the health and life is -- you can almost carve that off?
A. Yes. But it's part of the agency.
Q. And Marti is the one that primarily handles

any new health and life. And if I'm not mistaken, jointly owns or operates even Mike's old business of health and life; is that correct?
A. Yes.
Q. All right. And you don't do any independent health and life, do you?
A. I do not.
Q. All right. And Marti doesn't do any property and casualty?
A. She does not.
Q. Okay. Not that you couldn't each do one or the other?
A. She can't do property and casualty.
Q. Currently because of her license?
A. Correct.
Q. But if she were to get licensed there wouldn't be any prohibition against that?
A. Correct.
Q. All right. Real quickly I want you to turn to exhibit 101. That's Michael's contract with Nield, Inc.; is that correct?
A. Yes.
Q. And were you present when that contract was entered into?
A. No.

Q. Were you present during any of the negotiations for that contract?
A. No.
Q. Were you personally aware of any of the circumstances that were being considered at the time that such contract was entered?
A. I was aware that Mike had just left Farm Bureau. And any time you start a new agency the biggest hurdle you have to get over is that each one of those companies you write with want a large enough production number from you to justify doing business with you. When you first start out that's tough to meet. So he did -- that's one of the reasons he signed up with Nield, Inc., was to access more companies.
Q. Okay. And that kind of goes back to one of the first questions I asked you. That's one of the reasons of why to go through a general agent like Nield, Inc., is because they get the deals at all or maybe even a better deal with some of these insurance carriers; is that right?
A. Initially it is.
Q. And do you have any firsthand knowledge of whether there were any oral or written individual agreements beyond the contract that affected the compensation scheme between Nield, Inc. and Mike Kunz?

Q. Okay. Why don't you just keep the deposition up there in case we need to use it again.

Now going to exhibit 103. This is what we've kind of all labeled as the draft contract. You claim to have been provided with that in or around October of 2008; is that about right?

A. Yes.

Q. You reviewed that draft?

A. I did.

Q. Exhibit 103, how did you obtain it in the first place?

A. Bryan came down to our office and met with Marti and I and brought it to us.

Q. Was anyone with him at that time?

A. I believe he was alone.

Q. Okay. And based on your testimony today and previously, would you agree with me that you believe that exhibit 103 represented what you had previously discussed with Nield, Inc.?

A. Yes.

Q. So as you were entering that, you verbally agreed to this contract, even though it hadn't been finalized yet; would you agree with me on that?

A. Yes.

Q. And is it fair to say that you intended the

terms of this draft to be effective in your agent contract that you actually later signed?

A. The terms in this one I did.

Q. Okay. Let's move forward to 105. 105 is the contract that you actually signed, correct?

A. Yes.

Q. And even though it shows as effective January of 2009, it's your belief that you signed it shortly before that, maybe a month or two ahead of that?

A. Yes.

Q. And on that one you didn't really read it thoroughly prior to the signing, did you?

A. No.

Q. And you glanced at it. I think previously you indicated that you had it for about 10 minutes or so before you signed it; do you remember that?

A. Yeah, I could have had it 10 minutes and we were just doing a casual conversation.

Q. And who was with you at the time you signed that?

A. Marti was with me. Bryan was there and Tom was there.

Q. Do you remember if -- he goes by Benjamin and everyone calls him Benj. Do you call him Benj?

A. I do. I'm not a hundred percent sure if he

was there.

Q. Was he at all involved, as far as you know, in any of the communications or negotiations regarding that 2009 contract?

A. I don't remember him being involved with any of it.

Q. At the time that you met with Bryan and Tom, did you ask for additional time to review this contract that you signed?

A. No.

Q. And you would agree that it was designed to replace everything that came before it, correct? In other words, it took the place of the 1996 contract?

A. It did take the place of the 1996 contract; and we believed that it was the same contract as the draft.

Q. Okay. Now I want you to look at your paragraph seven, the terms of compensation. You indicated that you thought that it should be the same as Michael's contract; is that correct?

A. Yes.

Q. All right. I want you to look at your paragraph seven and I want you to look at Michael's paragraph seven in 101. His is in a Roman numeral. Yours is in Arabic, but I think they're both number seven.

Compare those two paragraphs, okay?

A. Okay.

Q. What's the difference?

A. "Agent will receive 80 percent of commissions received on insurance placed by agent with company." On my contract and on Mike's it says "Agent will receive 80 percent of the commission received on insurance placed with the company."

Q. So other than the change in your voice inflection, aren't the words identical?

A. No. You have -- I would say so.

THE COURT: It adds by agent. That's the distinction.

MR. WUTHRICH: We would note plural versus singular, Your Honor.

THE COURT: It speaks for itself. We can figure that out.

Q. (BY MR. HOOSTE) Prior to the 2009 contract was there any oral agreement that you had, or negotiation, with Nield, Inc. as to what commission meant? In other words, what it included or did not include?

A. No. Prior to the 2009, no.

Q. Okay. So in the significant, I guess, addition, if you will, to the 2009 contract, is now that you had purchased Mike's book of business from Judy and

the term bonus anywhere?
A. The specific word bonus, no.
THE COURT: Is that exhibit 105?
MR. HOOSTE: Right.
Q. (BY MR. HOOSTE) Does exhibit 105 contain the word contingent commission anywhere?
A. Specifically, no.
Q. And even though you used the word contingent commission, in terms of commission, to mean if someone's check bounces that's a contingency that is going to affect my total commission, isn't it used in the industry in a way that contingent commission has a specific meaning relating to some kind of an extra compensation? Not just that it's contingent, like hinged on someone making a payment, but this contingent commission, as used in the industry, is specific in terms of some kind of a scheme for extra compensation; would you agree with me on that?
A. I would agree that each company has their own additional guidelines that need to be met for the contingent commission.
Q. Is it true that you did not even use the term contingent commission to describe your claim for profit sharing until you learned of the term after receiving these documents in your subpoena?
A. That's correct.

Q. Does your 2009 contract, exhibit 105, contain the word profit share anywhere?
A. No.
Q. Does it contain even the word incentive anywhere?
A. Not that I'm aware of.
Q. Okay. I want to talk for a few minutes about Gem State. The way I understand it, it is a really different kind of a situation than all of the other companies?
A. No, it's not.
Q. Okay. You don't believe that Gem State has a different type of payment scheme than the other companies with regard to the Montpelier office of Nield, Inc. and the Pocatello office of Nield, Inc.?
A. No.
Q. As far as exhibit 106 goes, that's Bryan's memo to you indicating some profit sharing paid in 2011 for the earnings in 2010. Do you have that with you?
A. Yes.
Q. You didn't have any written correspondence with Bryan at that point in time, did you?
A. No.
Q. So the correspondence that you claim, if I recall correctly, was a phone call to Bryan believing that

it should have been split 80/20 rather than 50/50 back in 2011; is that correct?
A. No.
Q. Why don't you turn to page 123 of the deposition. For context, it's probably easier to start at line number 10. We really get into the questioning more around line number 15. We're talking about what was in the deposition as exhibit number 306. If I recall correctly, that was the same as this letter that is now admitted as 106.
A. And I made a mistake at that time. The first profit sharing check that I received from Gem State was actually in 2009 for the 2008 year. That's when I did call him.
Q. Okay. So let's go through this. Maybe this is just an issue of timing. I asked, "Did you make any claim to any additional funds regarding those two same companies, Gem State or Acuity, immediately after that memo?" And the memo would have been Bryan's memo to you, right?
A. Right.
Q. And you answered, "I did." I asked, "When did you do that?" You said, "Right after I received it I made a phone call to Bryan because he'd split the Gem State 50/50 and I thought it should have been split 80/20." I

asked, "Okay. How did he respond to that?" Your answer was, "In so many words, quote, no."
A. And I made a mistake on that timeline.
Q. So that's the only mistake in terms of that conversation that you're alleging today, is that the timing of that was different? You're saying that you did that two years earlier?
A. I'm saying that that conversation didn't happen pertaining to the 2010 year. The conversation happened pertaining to the profit sharing check received in 2009 for the 2008 year.
Q. Okay. So about two years earlier?
A. Yes.
Q. And Bryan indicated at that time that he disagreed with you, correct?
A. He said it should be split based on ownership.
Q. And you knew that was different than 80/20 back in 2009; is that right?
A. Yeah. I know the difference between 50/50 and 80/20.
Q. Okay. And the timing is correct based on what you just testified about?
A. Yes. That first check I phoned him on.
Q. Okay. But you didn't take any other action other than to tell him how you thought it should be and he

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRET D. KUNZ and MARTI KUNZ,)
Husband and Wife,)
Plaintiffs/Appellants,) Supreme Court No. 43724
vs.) Bear Lake County No.
NIELD, INC., dba INSURANCE) CV-2014-232
DESIGNERS, an Idaho)
corporation,)
Defendant/Respondent.)
_____)

REPORTER'S TRANSCRIPT ON APPEAL

Appealed from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, in the City of Paris, Idaho.

Honorable Mitchell W. Brown
District Court Judge

Reported by
Rodney M. Felshaw
Certified Shorthand Reporter

IN THE SUPREME COURT OF THE STATE OF IDAHO

Lodged at the Bear Lake County Courthouse in Paris, Idaho, this 9th day of February, 2016.

Cindy Garner
Clerk of the Court

By: _____
Deputy Clerk

IN THE SIXTH JUDICIAL DISTRICT COURT
BEAR LAKE COUNTY, STATE OF IDAHO
*****

BRET D. KUNZ and MARTI KUNZ,)
Husband and Wife,)
Plaintiffs,)
vs.) Case No. CV-2013-232
NIELD, INC., dba)
INSURANCE DESIGNERS,)
an Idaho corporation,)
Defendant.)
*****

BENCH TRIAL
DECEMBER 9, 2014
HONORABLE MITCHELL W. BROWN
(Volume 2 of 2.)
*****

APPEARANCES:
For the Plaintiff: Mr. Steven A. Wuthrich
Attorney at Law
For the Defendant: Mr. David A. Hooste
Attorney at Law
*****

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that. I'd rather just call him all at once on one great rebuttal rather than calling him and going through that again. To that end, subject to trying to lay additional foundation for exhibit 127, we would rest, but reserve the right to try and lay the foundation on that exhibit.

THE COURT: Through his rebuttal and whatever --

MR. WUTHRICH: Yes. Rather than calling him now.

THE COURT: All right. With that, then, do you have any objection to proceeding in that way, Mr. Hooste?

MR. HOOSTE: I guess I'm not sure in what way -- I just want to be sure I'm clear. He's resting, indicating that he may need to recall a witness in rebuttal?

THE COURT: And he wants to, in addition to whatever rebuttal testimony he would do, lay the foundation and attempt to admit exhibit 127. At a minimum as a demonstrative exhibit as part of that rebuttal as opposed to calling him two separate times, one now to try and lay that foundation and then introduce that exhibit.

MR. HOOSTE: We did have a discussion during the break. Maybe I'll pose this on the record. I think that in obtaining this Gem State agreement that is marked as 127, I guess I don't have any dispute that it is what it purports to be. It's a Gem State agreement that it would have with an agency. This one just happens to be blank.

The person that provided this as part of this

litigation just said this is what an agent's agreement would be if they were to have entered into it. It doesn't have a time frame, so I can't tell if this is the same exact agreement that Nield, Inc. would have entered into in the past or not. So I'm willing --

THE COURT: I assume that's the foundation he wants to lay.

MR. HOOSTE: I don't know that he can, because it was not entered by Bret. It would have been entered by other parties. Maybe at this point in time I don't have any strong objection because I think it goes to the weight. I don't know that it will end up with any weight at the end of the day. But to the extent that it purports to be what is as a demonstrative exhibit, if the court will limit it to that at this point in time, I would stipulate to its limited admission in that it is at least what an agent would sign if they entered into an agreement with Gem State presently.

THE COURT: I don't know how it could be offered or argued for any other purpose than that. It's blank. It doesn't -- it's not signed by any parties, it's not filled out in the blank spaces.

MR. HOOSTE: That's my point.

THE COURT: So based upon that, then, you are stipulating to its admission as a demonstrative exhibit,

being a type of agency agreement that would be offered by Gem State?

MR. HOOSTE: Yes. I don't think there's any sense in wasting time arguing about that.

THE COURT: It's admitted as a demonstrative exhibit for the purpose of being an agent -- the type or form of an agency agreement that would be required by Gem State. Does that address those issues, Mr. Wuthrich?

MR. WUTHRICH: Yes, Your Honor. That's sufficient. We can move on.

THE COURT: All right. So you've rested subject to any rebuttal testimony you may have?

MR. WUTHRICH: Correct.

THE COURT: At this point in time, then, the plaintiff has rested its case in chief in this matter on the bifurcated portion of this trial dealing with the declaratory judgment action that was initiated by Mr. Bret Kunz and Marti Kunz as a co-plaintiff.

Mr. Hooste, you may proceed.

MR. HOOSTE: Thank you, Your Honor. I think I'm bound, in the best interest of my client, to at least make a motion for involuntary dismissal under Idaho Rules of Civil Procedure 41(b) and 50(a).

In this case, where the court is sitting as the fact finder, there is, unlike a motion for summary

judgment or anything to that effect, the court has heard the evidence. You don't have to draw any inference in a light most favorable to the plaintiff. You're able to just weigh the evidence and at this point determine whether or not they have met their burden of proof as the plaintiff in showing that the declaratory relief is appropriate.

In that respect, in their complaint they've alleged that the contract places an obligation on Nield, Inc. to pay profit sharing or bonuses or other incentive. I think they use commission, not the word contingent commission in their complaint. But I think they put any other type of remuneration. Suffice it to say that they think the contract means that there should be some kind of a bonus paid.

Your Honor, they withdrew -- I guess I would also move to amend my pleading to the proof in some small degree. I believe that the statute of frauds would apply with regard to any oral agreement that has been testified to that goes beyond the contract with regard to any type of a contingent commission or profit share plan. The testimony has been that those cannot be completed in less than a year. They are a look-back for a year in the property and casualty.

That's going to be consistent with the

exhibits that have been produced. In particular I believe it's 201, 202, 204 and 205. So all of those, Your Honor, have this kind of separate contingent commission plan, a profit sharing plan. That goes to two things. It goes all the way back to, I think, this court's primary finding. This court has to find that the agency contract included profit sharing bonuses in order for the plaintiff to prevail. I don't believe the court can find that based on the evidence so far.

It's not in the four corners. There's no profit sharing, no contingent commission, incentives, bonuses, anything like that. The testimony is that the parties believed that exhibit 103 was the written form of what they intended to agree to. The plaintiffs have testified to that.

Within exhibit 103, Your Honor, and we went over it just recently with Marti, there's a term in there, under subsection seven, that any other form of compensation will be based on individual agreement with the company.

THE COURT: That's not in 105, though?

MR. HOOSTE: But it goes to the intent of the plaintiff.

THE COURT: You're telling me in your argument that I'm not to consider parol evidence because it's not in the

face of the four corners of the document.

MR. HOOSTE: All right.

THE COURT: So you have to pick one or the other.

MR. HOOSTE: I think it's sequential rather than one or the other, but I see what you're saying. So on the one hand, if you're looking at the four corners, it's not there. And the way commission is determined is there. It's in paragraph five, or pardon me, let me make sure I'm not misspeaking. Yes, paragraph five. It talks about commission. The agent has the responsibility for all of the premium and return commission on the business placed. And then when the collections are not on time deductions may be made. And when the collection is completed, deducted commission will be paid.

It's tying, Your Honor, commission -- if you read it in the whole context of the agreement, it's tying commission to premiums paid. Commission to premiums paid is consistent through everything that we've seen in the contracts, whether it be health and life or whether it be property and casualty. And as well, the intent of the drafter that commission be based on the written premium.

So I think this court first has to look at, in terms of the ambiguity question, is the alternative definition reasonable under the circumstances. Is it reasonable to say, oh, commission means contingent

commission or it means profit sharing.

Your Honor, both of the plaintiffs have testified that they didn't talk about that with the defendant at the time that the contract was entered. It didn't even cross their minds. They learned of the term contingent commission -- I shouldn't say they. I don't mean to use the plural. Bret testified that he learned of the term contingent commission basically through the course of this litigation.

Your Honor, as you look at Bret's correspondence, exhibit 108, or -- yeah, his correspondence. He sends in the profit sharing for Gem State and says, "I feel very strongly this should be split on the same basis as commission." So even he, in the context of that, is looking at profit sharing as in essence a separate term from commission. Otherwise he would say, hey, I believe my commission of 80/20 should include anything that you get. I think you have to take him at his word. Before the litigation starts he says, hey, there's profit sharing in the first sentence, and then it should be based the same as commission in the sentence. And in the third sentence, this was never even addressed in the contract with Mike or me, that the contract itself doesn't contain a provision for profit sharing or contingent commission.

To the extent that there is anything that Nield, Inc. may have an obligation to pay it would be outside the contract. Therefore, the declaratory judgment isn't appropriate. To the extent that this court says, well, I'm going to find that it's ambiguous and I'll look outside the four corners and look at the parol evidence, then I think you're still looking at how does his definition of commission and how does their understanding of the term commission at the time that the contract was entered, is it sensible to say that meant contingent commission.

Or, now going back to exhibit 03, is there some expectation that there be a separate contract, or at least an agreement entered, whereby anything above and beyond commission be paid. I think exhibit 103, and their understanding of exhibit 103, which they had plenty of time to review and indicate, both of them, that that is what we intended to enter, that it shows that commission would be separate from any other kind of compensation. In that context it's difficult to circle back and say, well, yeah, that's a different kind of compensation, but we think it should be in commission because otherwise it would have to be --

THE COURT: Let me interrupt you for a minute. I probably should have done this at the outset of your

motion. Are you aware of any authority that would entitle you or another defendant in a declaratory judgment type action to move for a motion -- to make the motion you are making in a declaratory judgment action? It seems to the court that by it's very nature a declaratory judgment action, brought pursuant to Idaho Code section 10-1201, is asking for just that, a declaratory judgment of the court regarding the rights of the parties, vis-a-vis in this case the contract in question.

Even if Mr. Kunz and Ms. Kunz do not prevail with the court on their interpretation of this contract, or their asserted interpretation of the contract, doesn't the court still have an obligation under 10-1201 to grant the declaratory relief and identify and determine what the rights of the parties are vis-a-vis this contract? And if that is correct, isn't your motion of no consequence?

MR. HOOSTE: I think that under Rule 41(b), even though it's labeled dismissal, and if you have the rules with you, Your Honor, on the top of page 327.

THE COURT: I'm familiar with the rule.

MR. HOOSTE: "The court as trier of fact may then determine them," relating back to the facts, "and render judgment against the plaintiff; or may decline to render any judgment until the close of evidence." So I think --

THE COURT: I'm not being asked to render

affirmative relief in this case as far as a money judgment or a dismissal. I'm being asked to provide declaratory judgment and identify and explain the rights as between the parties.

In my years of practice and my years on the bench I've never seen this motion brought in this context in a declaratory judgment hearing. I'm not sure it's appropriate and I'm not sure how it would work. Then I have not done what I was asked to do in the complaint and that is to declare the rights of the parties, vis-a-vis this contract. So my question is, yes or no, is this an appropriate motion under this cause of action?

MR. HOOSTE: I guess, Your Honor --

THE COURT: You are effectively asking me to dismiss their case. A directed verdict is a different motion under a different rule that is brought before a jury. This isn't a directed verdict motion either. I'm not sure it's an appropriate motion.

MR. HOOSTE: I follow you, Your Honor. I don't have any specific rule that I -- I was looking at 50(a) and 41(b). And with 41(b) I understand the court's interpretation there.

THE COURT: 51(a), is a directed verdict motion. Unfortunately, although the court was affirmed in this case, I was taken to task by the Idaho Supreme Court for

inadvertently referring to a motion to dismiss under 41(b) as a directed verdict type of motion. The Supreme Court gently reminded me that they are two different motions. A directed verdict motion is to be brought in a jury trial context. So the only avenue available for you is under 41(b), and I don't think it is applicable in a declaratory judgment type action.

MR. WUTHRICH: For the record, we don't -- we object to any attempt to amend the pleadings after our closing. We've not addressed statute of frauds and it wasn't addressed in their pleadings.

THE COURT: To the extent I need to rule on that, I ruled and discussed that this morning regarding, I think it was this morning, regarding the issue of implied in fact contract. It was asserted that there was no attempt by the plaintiff to assert an implied in fact contract. So therefore there is no statute of defense -- no statute of frauds defense available.

Again, just briefly, I want to wrap this up. I don't even want to take the time to hear Mr. Wuthrich's argument in response to your motion because, unless you can point me to some authority or some basis for a declaratory relief type claim, I'm going to deny it as a matter of law.

MR. HOOSTE: I don't have any additional authority,

Your Honor.

THE COURT: That will be the ruling of the court at this point in time. You may call your first witness.

MR. HOOSTE: Thank you. The defense calls Stephen Ahl.

THE COURT: Mr. Ahl, please approach my clerk and raise your right hand and she'll place you under oath, sir.

STEPHEN AHL,

being first duly sworn to tell the truth relating to said cause, testified as follows:

THE COURT: Please state and spell your first and last names.

THE WITNESS: Stephen Ahl. S-t-e-p-h-e-n. A-h-l.

THE COURT: Mr. Hooste, you may examine the witness.

DIRECT EXAMINATION

BY MR. HOOSTE:

Q. Mr. Ahl, can you give us a brief description of your educational background?

A. Sure. I graduated with a bachelor of psychology from Nebraska Wesleyan University.

Q. And when did you do that?

A. I graduated in, I believe, 2001.

Q. Okay. And how are you currently employed?

A. I'm employed by Nationwide Insurance Company.
Q. And is Allied a subsidiary of Nationwide, or how are they related?
A. It is. Nationwide purchased Allied Insurance in 1998. We operate under the name Allied Insurance.
THE COURT: Mr. Ahl, you're by nature, I can tell, a very fast talker. We'll have trouble. I want you to be deliberate in thinking about slowing down. We've got to keep a record of this and I can tell you'll cause problems for the court reporter. Be deliberate. I don't want to make you nervous or uptight, but be deliberate and try to slow down.
THE WITNESS: Yes, sir.
Q. (BY MR. HOOSTE) Can you explain to me what some of your duties and responsibilities are based on your current employment?
A. Sure. I am a sales manager with Allied Nationwide Insurance. I'm responsible for southern Idaho and eastern Oregon. My responsibilities are appointing new agencies, helping them manage a book of business with Allied Nationwide. Helping them with their relationship with underwriting and the company that I work for.
Q. Okay. And can you briefly run through your work history subsequent to your graduation from college?
A. Sure. I started with Allied in, I believe,

2001, as a claims associate in the Lincoln, Nebraska office. I did that for about five years. Then I was a claims manager in southern California for approximately two years. From there I went to Denver, Colorado where I was an underwriting manager for just under two years. And then I have been in this role a sales manager for just over four years now.
Q. And do you have direct contact with general agents with regard to the contractual relationship that they have with Allied?
A. Can you say that again?
Q. I'm speaking like a lawyer. Do you help clients such as Nield, Inc. determine what contractual relationship they have with your company?
A. Yes. That is one of the things I mentioned earlier. Part of my job is to appoint new agencies. And in doing that I go over the contract with the agencies.
Q. And are you familiar with the contract between insurance carriers generally in addition to yours and other general agents?
A. Sure. We have to be aware of our competitors, I guess you can call it.
Q. Okay. And are you familiar with the agency agreement and the marketing plan contract with Allied and Nield, Inc.?

A. I am.
Q. How are you familiar with those?
A. I've reviewed them. I was not in this position when the agreements were signed, but I have since then reviewed them.
Q. Okay. And if Nield, Inc. had a conflict with that contract now, would you be the person they go to?
A. Yes.
Q. Have you entered contracts similar to the contracts that you reviewed in this case?
A. I have.
Q. Under similar terms?
A. Yes.
MR. HOOSTE: Your Honor, does the witness have the defendant's book of exhibits?
THE COURT: He does not. I'll provide it to him.
MR. HOOSTE: In particular 201 and 202.
THE COURT: I think we have them all here in a lump. 201 and 202 are there.
Q. (BY MR. HOOSTE) Do you see 201 and 202?
A. I do.
Q. Do you recognize those?
A. I do.
Q. Is that the agreement that is currently in place between Allied and Nield, Inc.?

A. It is, yes.
Q. Now, in the original exhibit 201, is there a provision for profit sharing in the original agreement?
A. I do not believe so.
Q. Does an appointment automatically have profit sharing go along with it?
A. Meaning?
Q. A new appointment -- is there automatically profit sharing in an agent contract like that for appointment?
A. Yes.
Q. Is profit sharing calculated different than standard commission?
A. Yes, it is. Profit sharing is something separate. You have to qualify for a profit share. Commission is based upon premium that is paid into the company that we -- that's how we compensate an agency is based upon the premium that is written with the company.
Q. Okay. How often is commission paid?
A. Commission is paid monthly.
Q. How often is profit sharing paid?
A. Profit share, when it is paid, and again you do have to qualify for profit share, and when it is paid it is paid once a year; so annually.
Q. In terms of the qualifications for profit

A. Yes.
Q. How are you aware of that?
A. I'm aware of that because that's what I do every day. I work with agencies to write business, so that's how they get paid monthly is a percentage of the premium to the company that gets paid out in commission to the agency.
Q. Okay. And are you familiar with other agencies beyond Nationwide and how they use the term commission?
A. I believe it's the same way.
Q. All right. And what is the basis of that belief?
A. In talking with other sales reps within the industry, talking with other agencies within the industry.
Q. Is that part of knowing your competition?
A. Part of knowing the competition and knowing the job.
Q. So do you believe that there is a distinction in the insurance industry between the term commission and profit sharing?
A. I do.
Q. And let me back up a minute here. Is there a consistent manner in which commission is defined? Standing alone without any other modifiers, the term

commission that is defined within the insurance industry?
A. Well, going back to what I said before, it would be a percentage of the premium. A standalone premium that comes into the carrier for a specific policy. We pay a percentage of the premium. And then, if the policy cancels, we would actually take money back away from the agency if the policy does not sustain the life of the policy period.
Q. So it's written premiums subject to corrections?
A. Correct.
Q. And you indicated that there was a distinction. How would you define profit sharing?
A. Profit sharing in the industry can also be -- some folks call it profit share, some folks call it contingency. So commission is paid regardless. As a company gets money in we pay a percentage out. For profit share or contingency there's certain qualifications that need to be met in order for that be paid out. Some of those qualifiers are that there has to be a certain amount of premium; there has to be certain loss ratio. The book of business has to perform a certain way in order for an agency to qualify for that contingency commission or profit share, which is not the case for commission.
MR. HOOSTE: Give me a moment, Your Honor.

(Pause in the proceedings.)
Q. (BY MR. HOOSTE) What is the National Association of Insurance Commissioners, or NAIC.
A. It's --
MR. WUTHRICH: Didn't we already admit this exhibit, Your Honor?
THE COURT: Are you laying foundation for it or trying to find out if he knows who they are?
MR. HOOSTE: Well, Your Honor, it's foundational at this point in time. I think it's to determine -- I don't think that we presented evidence to the court as to the nature of that authority.
THE COURT: And part of the reason why is because there's been a big donnybrook about whether or not that's even relevant to this proceeding.
MR. HOOSTE: I think it's relevant, and I may not have articulated this very well yesterday. It's relevant to determine whether or not the alternative proposed definition of commission by the plaintiff is reasonable. If there's a standard and people believe --
THE COURT: Before you do that, ask him if he's familiar with the standard as articulated by the NAIC. Otherwise I'm not going to let you go further.
Q. (BY MR. HOOSTE) Are you familiar with the standard definition posed by the NAIC with regard to the

term commission?
A. I'm not familiar with exactly how that reads.
MR. WUTHRICH: Then I'll object to further questions on this line.
THE COURT: Well, there hasn't really been any yet. Let's wait until we get one.
MR. WUTHRICH: I'm just trying to speed it along.
THE COURT: I know, but we need to let him propound a question before I can rule on an objection.
MR. HOOSTE: I guess, Your Honor, if it please the court, may I not ask the witness questions regarding the authority of the NAIC so that the NAIC's definition stands on its own?
THE COURT: Mr. Hooste, what you want to do is have him state that the definition that is in evidence from the NAIC is different than that asserted by Mr. Kunz. I already know that. He's already stated what his definition of commission is. So I've got all of the relevant evidence I want on that issue.
MR. HOOSTE: I guess, Your Honor, and I'm happy to move on if this isn't the case, but it's my impression that in order to determine that the NAIC's definition means anything, there has to be a belief that the NAIC has any kind of an influence in the field. That's really what I'm asking.

And it spells out what percentage they'll pay on the different classes of business.

MR. WUTHRICH: Your Honor --

THE WITNESS: The contingent commission is the same as the profit sharing.

THE COURT: Just a minute.

MR. WUTHRICH: I looked just quickly at the Acuity contract. It appears to have been signed by Bryan Nield as president and Tom Nield appears on there only as a witness.

MR. HOOSTE: He was the owner of the business at the time, Your Honor.

THE COURT: I think we're just getting bogged down in some real minutia that seems to want to argue about a lot of these issues. He's clearly a signator on 201. I'll allow him to answer as relates to 201.

THE WITNESS: So what's the question?

Q. (BY MR. HOOSTE) The question is, in essence is there a distinction between commission and profit sharing and contingent commission?

A. Yes, there is. It's never intended that commissions include profit sharing or contingent commission.

Q. And does that understanding that you have with those companies affect your own belief of what commission

meant as you then entered your contracts with your subcontractors?

A. They were the same.

Q. The intent was the same?

A. The intent was the same.

Q. Okay. Based on your entire experience and your education and training in the insurance industry, is there -- within the insurance field is there a distinction between commission and contingent commission?

A. Yes, absolutely.

Q. When you were the owner of Nield, Inc., did Nield, Inc. ever share with any producer profit sharing that you received from an insurance carrier based on a subcontractor's rate of commission?

A. No.

MR. WUTHRICH: I believe that was asked and answered.

THE COURT: I don't recall. If it was I'll -- it won't hurt. If it wasn't, I'll allow it.

THE WITNESS: No.

MR. HOOSTE: Nothing further.

THE COURT: All right. Cross-examination, Mr. Wuthrich.

MR. WUTHRICH: Thank you.

CROSS-EXAMINATION

BY MR. WUTHRICH:

Q. We've talked a little bit about these other functions. One of the things you talked about that you may have paid Mike Kunz on was for some advertising?

A. No, we didn't pay him. We did the advertising out of our own account. We didn't pay him for it, we just did it. Yellow Pages, newspaper, those kinds of things.

Q. And then you talked about some -- when you said that there were other function, that wouldn't be in any way associated with an 80/20 split?

A. You mean the other function?

Q. Yes. Advertising?

A. No. We just did that.

Q. All right. During the time that you were paying Bret commissions, did there become a time when there was some dispute over the accuracy of the accounting?

A. Yes, there was.

Q. And did the accounting then get sort of moved to Mike's office so they could track it?

A. No. When Bret came to me he said that we had missed some commissions on some of his accounts. I went back about four months and reviewed that. It took a lot of time. I found that one of the commissions had been

sent to Mike. Another commission we hadn't received from the company yet. And Bret wasn't considering that if he -- if the policy canceled there was a return premium to the company. So I worked that out. Basically it came out to a wash. In other words, maybe they owed me a dollar. I wasn't worried about that.

Q. Just the one time?

A. Then he came back about a month later. Him and his wife came to my office. Bret said I have another thing. I said, Bret, I told you before I'm not going to do this any more because it's time consuming and expensive. You can work it out with Mike. He let go at me with superlatives that I can't repeat.

Q. Okay.

A. So that also helped with encouraging Mike, look, you need to get direct contact with the Applied system.

Q. You draw a distinction between commission, as you call it regular commission, and contingent commission. They are both predicated to some part on premiums sold, correct?

A. Okay. No, because the contingent commission was based upon premium in relationship to losses incurred.

Q. I understand that. But I'm asking you, both of them are first contingent upon premium being sold,

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiffs/Appellants, vs. NIELD, INC., dba INSURANCE DESIGNERS, an Idaho corporation, Defendant/Respondent.	Supreme Court No. 43724 Bear Lake County No. CV-2013-232

REPORTER'S TRANSCRIPT ON APPEAL

Appealed from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, in the City of Paris, Idaho.

Honorable Mitchell W. Brown
District Court Judge

Reported by
Rodney M. Felshaw
Certified Shorthand Reporter

Court on the procedure associated with certificating this matter for appeal on an interlocutory appeal basis. And also on the merits of my findings of fact and conclusions of law whether they are supported by the evidence or not.

MR. PRESTON: Your Honor, the only thing that I guess I would add is at this point in time I haven't heard anything from the Kunzes objecting or disagreeing that the new final judgment that this court issued does not address any other issues besides that which were addressed at trial.

And the only other issue I would have for clarification is just a stylistic issue, whether or not this new final judgment is intended to be an amended judgment of the previous final judgment or a whole separate creature and a whole separate judgment.

THE COURT: Let me clarify two issues. I never viewed this as a final judgment. I recognize that if you certify a judgment as appealable under 54(b), then it becomes an appealable issue and final for purposes of appeal. But, again, I don't want there to be any confusion or misunderstanding, I've never viewed this judgment as a final judgment. There are and continue to be unresolved claims. That's point number one.

Number two, I'm the one, as the presiding judge, who certifies issues for appeal interlocutory. So

the basis for the appeal, I think, is not what Mr. Wuthrich may raise on appeal, if he wanted to raise something else, but in line with what I've certified to take up on appeal. And what I've certified to take up on appeal is the findings of fact and conclusions of law following the court trial wherein I reached the findings of fact and conclusions of law which gave rise to the attempt at a Rule 54(b) declaratory judgment.

I don't know if Mr. Wuthrich wants to add more to that or what you want to address.

MR. WUTHRICH: I'm still where I was. I want to leave it alone.

THE COURT: Mr. Preston, anything else before I finally rule?

MR. PRESTON: Just, Your Honor, that I think it's interesting, and I don't know the answer to this, it just came to my mind, that the use of the statute, 10-1201, contemplates that a declaratory judgment is a final judgment. It's interesting to me that the term final judgment is used in that setting, which is separate from the setting that it's used in the Rules of Civil Procedure 54. What effect that has I don't know. That issue just popped into my mind.

THE COURT: Certainly the Rules of Civil Procedure allow parties to consolidate claims. And a declaratory

judgment can be consolidated with a breach of contract and other requests for relief. So, yeah, I guess those are issues you guys will have to sort out with the Supreme Court.

At this point in time the court is going to deny the defendant, Nield, Inc.'s, motion to alter or amend the judgment in this matter. I guess I'm willing to go forward and for better or worse let the Supreme Court help in identifying the procedure that is necessary to do what we've done. If I've done it incorrectly, then they can address that and I'll learn from that moving forward. If I've done it correctly, then great.

Then we'll also in more efficient order get to the merits of the appeal, which I'm sure both Mr. Kunz and Mr. Nield would like to do at this point in time as well.

I'm going to deny the request at this time and will allow this matter to continue forward on appeal.

Thank you, Mr. Preston. Thank you, Mr. Wuthrich. If there's nothing else, we'll be in recess.

(Hearing concluded.)

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

BRET D. KUNZ and MARTI KUNZ, Husband and Wife, Plaintiff/Appellant, vs. NIELD, INC., dba INSURANCE DESIGNERS, an Idaho corporation, Defendant/Respondent.	**CASE NO. CV-2013-0000232** **Supreme Court No. 43724** **CERTIFICATE OF EXHIBITS**

I, CINDY GARNER, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

PLAINTIFF'S EXHIBITS:

NO:	DESCRIPTION:	SENT/RETAINED
101	Michael O. Kunz Agent Contract 1982	Y
102	Bret D. Kunz Agent Contract 1996 (1982)	Y
103	Marti Kunz Contract Draft	Y
104	Marti Kunz Signed Contract	Y
105	Bret D. Kunz signed Contract 2009	Y
106	Memo from Nield, Inc for 2010 Profit Sharing	Y
107	Memo from Nield, Inc for 2011 Profit Sharing	Y
108	Memo from Bret Kunz to Nield, Inc 1-16-13	Y
109	Memo from Nield, Inc Re: 50/50 split on Profit Sharing 1-22-13	Y
110	Memo from Bret Kunz to Nield, Inc, Re: Reply to 109, 4-5-13	Y
111	Email from Bret to Nield, Inc, Re: what company the $424 came from 4-17-13, and Marti's note	Y
112	Email from Marti to Nield, Inc, 6-4-13	Y
113	Farmer's Alliance Contingency worksheets, 2013-2009	Y
114	Acuity Contingency worksheet 2013-2009	Y
115	Gem State Profit Sharing, 2008 Paid in 2009	Y
116	Gem State no Profit Sharing 2009	Y
117	Gem State Profit Sharing 2010	Y
118	Gem State Profit Sharing 2012	Y
119	E&O Declaration Pages showing Name and changes	Y
120	E&O Dec. Pages, 2008-2009	Y
121	E&O Dec. Pages, 2009-2010	Y
122	E&O Dec. Pages, 2010-2011	Y
123	E&O Dec. Pages, 2011-2012	Y

124	E&O Dec. Pages, 2012-2013	Y
125	E&O Dec. Pages, 2013-2014	Y
127	Gem State Blank Agency Agreement (demonstrative purposes only)	Y
128	Purchase Contract from Judy Kunz	Y

DEFENDANT'S EXHIBITS:

NO:	DESCRIPTION:	SENT/RETAINED
201	Allied Insurance Agency Agreement with Nield, Inc entered December 2, 2002	Y
202	Allied Insurance Agency Marketing Plan agreement entered Dec 29, 2004 with Nield Inc including addendums	Y
203	Allied Insurance Agency Cover Letter dated Dec 30, 2011 and contact addenda reflecting the processing of the name change from Michael Knuz to Nield Inc, dba Insurance Designers	Y
204	Acuity Insurance Co Agency Agreement between Acuity and Nield Inc signed Dec 17, 2007	Y
205	Contract between Farmers Alliance and Nield Inc dated Jan 1, 2009, and including Addendum A,B and C	Y
206	Letter dated 01/16/13 from Bret Kunz to Bryan Nield Re: Gem State profit sharing bonus	Y
207	Letter dated 01/22/13 from Bryan Nield to Bret in response To Bret's letter dated 01/16/13	Y
208	Letter dated 04/05/13 from Bret Kunz to Bryan Nield Re: profit sharing	Y
209	National Association of Insurance Commissioners' Glossary Of Insurance Terms	Y
210	State of Idaho Department of Insurance Bulletin No 140-03	Y
212	Affidavit of Bryan Benishek	Y
213	Agent Agreement Insured Bear Lake & Life Map	Y
214	Agent Agreement Insured Bear Lake & Pacific Source	Y
215	Agent Agreement Insured Bear Lake & Select Health	Y

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 29th day of February, 2016.

(SEAL)

CINDY GARNER,
Clerk of the District Court

By Karen Volbrecht
Karen Volbrecht, Deputy Clerk

Insurance Designers

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AGENT CONTRACT

I) COMPANY:	Nield, Inc. DBA: Insurance Designers
II) AGENT:	Bret D. Kunz
III) DURATION OF RELATIONSHIP:	Indefinite or as long as authorized by Board of Directors of company and Michael O. Kunz.
IV) RELATIONSHIP:	The association existing between the Company and the Agent: This Association exists because of Michael O. Kunz and does not revise that relationship but is subject to the Company contract with Michael O. Kunz. This association is not an Employer/Employee relationship. The Agent is a sub-contractor and the Company provides markets through which the Agent can place Insurance Business.
V) RESPONSIBILITIES OF AGENT:	The Agent is a sub-contractor and as such has full responsibility for all expenses related to his business. This includes but is not limited to Federal, State, FICA, unemployment and local taxes. The Company will provide to the Agent a 1099 Form showing annual earnings. The Agent is responsible for Workers Compensation for self and all employees. Agent is to place Insurance Business through Company except for health and life policies that are individual company appointments. Agent is responsible to be familiar with and follow the underwriting, binding authority and other guidelines of all insurance carriers represented by the Company. Company has final underwriting authority for all business placed. Agent is responsible for all

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Insudesi@axxess.net
www.worldwebarchitects.com/insurancedesigners

Tom Nield
Bryan Nield
Benjamin Nield

"B"

premium and return commissions on business placed. When collections are not on time, deduction may be made from payment of commissions due. When the collection is completed the deducted commission will be paid. Agent has responsibility for own health, life and other personal insurances for self and all employees.

VI) RESPONSIBILITYOF COMPANY: The responsibility of the Company is to maintain contracts with Insurance Companies for placing insurance. Do all billing and accounting functions (except collections). Agent is personally responsible for the collection of premiums and returned commissions on business placed. Provide Agent with an earned commission statement and a commission check based on the agreed percentage on the 15th of each month. Other functions based on commission split and individual agreement. Provide Form 1099 for each calendar year by the 30th of January of the following year.

VII) TERMS OF COMPENSATION: Agent will receive 80% percent of commission received on insurance placed with Company. Company will receive 20 % percent of commissions placed by Agent through Company.

VIII) ERRORS & OMISSIONS: Agent must keep in force at all times Errors & Omissions Insurance on Agent and all employees for limits of at least $1,000,000 per accident and $3,000,000 aggregate. This coverage may be purchased, at agent's expense, as part of the Errors & Omissions policy maintained by the Company. The Errors & Omissions policy maintained by

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the Company covers insurance policies placed through Company and health and life policies that are individual company appointments. The agent is responsible for any/all deductibles related to such coverage desired on Company insurance policies.

EFFECTIVE DATE OF CONTRACT: January 1, 1982

SUB-CONTRACTOR:

Bret D. Kunz

Michael O. Kunz

COMPANY: NIELD, INC.
DBA: INSURANCE DESIGNERS

Thomas S. Nield, CEO

Bryan A. Nield
President

WITNESS SUB-CONTRACTOR

WITNESS COMPANY

EXHIBIT 17

Insurance Designers

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Agent Contract

1) Company:	Nield, Inc. dba: Insurance Designers
2) Agent:	Bret D. Kunz
3) Duration of Relationship:	Indefinite, or as long as authorized by Board of Directors.
4) Relationship:	The association existing between Company and Agent. This association is not an Employer/Employee relationship. The agent is a sub-contractor and the company provides markets through which an agent can place insurance business.
5) Responsibilities of Agent:	The agent is a sub-contractor and as such has responsibility for all expenses related to his or her business. This includes, but is not limited to, federal, state, FICA, unemployment, and local taxes. The Company will provide to the Agent a 1099 Form showing annual earnings. The agent is responsible for Workers Compensation Insurance on self and employees. Agent is to place all insurance business through company. Company has final underwriting authority for all business placed. Agent has responsibility for own health, life and other personal insurances. Agent may not place insurance business through another company. Agent is responsible for all premium and return commissions on business placed. When collections are not on time, deduction may be made from payment of commissions due. When the collection is completed the deducted commission will be paid.
6) Responsibilities of Company:	Company will maintain contracts with companies for placing of insurances. Company will do all billing and accounting functions (except collections). Agent is personally responsible for the collection of premiums and returned commissions on business placed. The company will provide to the agent a 1099 Form showing annual earnings.

Tom Nield
Bryan Nield
Benjamin Nield
Tina Steffens

insudesi@nieldinc.com
www.nieldinc.com

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7) Terms of Compensation: Agent will receive 80 percent of commissions received on insurance placed by agent with company. Company will receive 20 percent of commissions placed by agent with company.

8) Ownership: This is subject to change, but only as agreed between Company and Agent. The agent will own 50% of the book of business and the company will own 50% of the book of business. If agent decides to sell his percent of ownership, the company has first right of refusal at a price determined at the time of sale. If company refuses to purchase, the agent may sell his percentage of ownership to a licensed and qualified agent for the State of Idaho and must be approved by the company. A covenant not to compete will be included in the contract of sale. .

8) Errors and Omissions: Agent will keep in force Errors and Omissions insurance on agent and employees. This coverage will be purchased as a part of the Errors and Omissions policy maintained by company. The agent is responsible for all premiums and deductibles assessed by the policy. It is understood that the Errors and Omissions policy maintained by the company is only for insurance placed through the company.

Effective Date of Contract: January 1, 2009.

Company: Nield, Inc. DBA: Insurance Designers

Agent: Bret D. Kunz

President: Bryan Nield

Witness: Marti Kunz

Vice President: Benjamin Nield

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Bryan Nield
Benjamin Nield
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STAFF MARKETING CONTRACT FOLDER

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- ☐ 72-LRO
- ☐ 74-DMRO
- ☒ 75-RMRO
- ☐ 78-PCRO

STATE/AGENCY CODE: ID 23726

AGENCY NAME: INSURANCE DESIGNERS

DESCRIPTION: AIDCO MKTG/DATED

- ☒ CONTRACTS
- ☐ IRS
- ☐ TRANAGREEMENT
- ☐ SRVCPLUS
- ☐ EFTEZSWEEP
- ☐ OTHER ADDENDUMS
- ☐ GROUP FILE

DATE: 12/04 BY: CP (INITIALS)

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AIDCO
MARKETING PLAN

In consideration of the mutual obligations herein, this Marketing Plan dated this 29 day of December, 2004, is intended to supplement the agreements of the parties set forth in their Agency Agreement dated December 2, 2002. It shall constitute a guide for the development of a continuing business relationship pursuant to said Agency Agreement. The terms of the Marketing Plan which are agreed upon and duly acknowledged by Company, as defined in the Agency Agreement, and Agent, as defined in the Agency Agreement, are hereby incorporated into said Agency Agreement.

I. Purpose.

The joint effort of Company and Agent under this Marketing Plan shall be to market, sell, and service personal lines property-casualty insurance products. The structure of their relationship, as set forth in this Marketing Plan and the Agency Agreement into which it is incorporated, is intended to create mutual operational efficiencies. Attainment of such operating efficiencies will be facilitated by the parties' reciprocal commitments. Agent will transfer its outstanding book of personal lines property-casualty business to Company within eighteen (18) months of the date of this Marketing Plan. During the term of this Marketing Plan, Agent will place with Company all new personal lines property-casualty business it writes. When any such business is unacceptable to Company, Agent shall give preference in the placement thereof to Company's brokerage. Company shall have the right and authority to periodically audit Agent's records to confirm compliance with this and any other provision of this Marketing Plan.

The parties intend that their business together should continually expand and they shall agree during each calendar year upon a percentage increase in that year's net premium volume which they will establish as their goal for the succeeding calendar year. Should the parties be unable to reach agreement concerning such goal for percentage increase, their goal shall be determined according to the industry statistics produced by insurance industry financial reporting service, for the year preceding the current calendar year, according to the following formula:

> The goal for percentage increase in net written premiums shall equal a percentage, which is the average growth in the homeowners, private auto physical damage, and private auto liability lines of the property-casualty insurance industry in the Agent's state of domicile, multiplied by 1.5.

II. Termination.

A. Termination at Company's option. Company may unilaterally elect to immediately terminate this Marketing Plan upon the occurrence of any of the following events:
   1. Agent has no officer or employee who is a duly licensed insurance agent;
   2. Agent is unable to pay its debts as they mature; makes an assignment for the benefit of creditors; is dissolved; has a receiver or liquidator appointed for all or a substantial part of its property; or has insolvency, bankruptcy, reorganization, or similar proceedings instituted by or against it;
   3. Agent or any of its employees misappropriates any of Company's funds or property; or
   4. Agent fails to meet any goal for production increase which is set pursuant to or established by the Marketing Plan.

B. Termination for cause. If either Party shall violate any of the covenants undertaken herein or any of the duties imposed upon it by this Marketing Plan, such violation shall entitle the other party to terminate this Marketing Plan; provided that the Party desiring to terminate for such cause shall give the offending Party at least 30 days written notice of the particulars wherein it is claimed that there has been a violation hereof and that, if at the end of such time the Party notified has not removed the cause of the complaint or remedied the purported violation, the termination of this Marketing Plan shall be deemed complete.

C. Termination by mutual agreement. Agent and Company may terminate this Marketing Plan on any mutually acceptable terms.

D. Termination without cause. Company or Agent may terminate the Agency Agreement and this Marketing Plan without cause upon written notice to the other at least 365 days prior to the date of such termination.

III. Products.
Company shall provide Agent with the following inventory of personal lines property-casualty insurance products and with multiple policy credits.

Private Auto	Recreational Vehicle
Homeowners	Dwelling Fire
Mobile Homeowners	Personal Umbrella
Pleasure Boatowners	Personal Inland Marine

IV. Marketing Systems and Support.
In order to mount an efficient and economical sales effort, Company and Agent will utilize various marketing techniques which may include direct response, telemarketing, direct mail, and e-commerce. All policies will be sold on a direct bill basis utilizing Company's "Flex-Pay" and/or "Flex-Chek" payment options. Company will provide Agent with the following support services:

A. Company will pay the cost of "x-dating" 1200 names per year through its affiliated telemarketing service. Agent must provide Company with an appropriate list of names, phone numbers, and other required information at a time or times agreed upon by the parties. The expirations lists obtained thereby shall be Agent's exclusive property.
B. Company will pay all reasonable expenses, excluding salary and other compensation, incurred by reason of the attendance of two of Agent's licensed producers at a Company sales school.
C. Company shall supply Agent with the marketing support services provided through specific Company programs utilized from time to time.
D. Company will assist in training Agent's producers; provided, that they are hired by Agent to sell only Company's products.

V. Promotion
A. Materials - Company shall provide and Agent shall utilize sales brochures and other printed materials bearing Company's trademark which are of the type and quality customarily employed in an insurer-agency relationship.
B. Advertising Support - Company shall reimburse Agent in an amount equal to 50% of Agent's expenditures for "eligible advertising" in any calendar year; provided, that Company's maximum expenditure therefor shall not exceed $2,500.00 for the first calendar year hereof and that for any subsequent year shall not exceed ½ of 1% of that net premium volume produced by Agent for Company in the preceding calendar year.

In addition, but pursuant to the limitation imposed by the maximum expenditure constraint set out above, Company shall increase its percentage reimbursement from 50% in any calendar year by one percentage (1%) for each $1,000 of net premium increase in excess of $75,000 during that calendar year. The Company shall never provide percentage reimbursement in excess of 100%. "Eligible advertising" shall mean advertisements prepared by Company for publication in newspapers or on radio, and the reimbursable costs thereof shall not include any service charges of advertising agencies. Agent must comply with Company's written reimbursement procedures.

VI. Processing.
Company will provide automation to process personal lines business with Company in a "paperless" environment. Company shall provide Agent with direct assistance in processing the conversion of its existing book of personal lines property-casualty business to Company.

VII. Remittance of Premiums.
Premiums will be paid by Insureds directly to Company. However, any monies for premiums owed to Company which are collected by Agent shall be the property of Company and shall be immediately forwarded to Company and, while in Agent's possession, shall be held in trust for and on behalf of Company as a fiduciary trust.

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VIII. Profit Share.
Personal lines and commercial lines profit share agreements for the business placed by Agent with Company are attached hereto as Addendum A and Addendum B.

IX. Control.
Where the terms of the Marketing Plan conflict with the terms of the Agency Agreement, the terms of the Marketing Plan control.

Agent: [signature]
By BRYAN NIELD
Title PRESIDENT

Company
By [signature]
Title Regional Vice President

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ADDENDUM "A" TO MARKETING PLAN
Personal Lines Profit Sharing Agreement

As consideration for the execution on even date herewith of the Marketing Plan between Agent and Company, said parties hereby enter this Personal Lines Profit Sharing Agreement to be effective January 1, 2004.

I. Profit Sharing.

To compensate Agent for exercising skill, caution, and diligence in the selection of risks insured by Company, Company will pay Agent a "Profit Share" (as herein defined) based on "Gross Profit" (as hereinafter defined) realized by Company on personal lines business written by Agent under said Agency Agreement referenced in the Marketing Plan. Profit Share shall be calculated using the following formula for each "Profit Sharing Year" (as hereinafter defined).

A. Method and formula. A "Profit Sharing Year" (PSY) is the accounting period extending from January 1 through December 31. The formula is designed to reflect the profitability of the business written by Agent for Company on a three year average which shall include the current PSY (the PSY for which the calculation of profit sharing is being made) and the two PSY's immediately preceding it. (If Agent had no existing agency relationship with Company at the time of the execution of the Agency Agreement, the first PSY calculation of Profit Share shall be made according to the same Formula, but "Earned Premiums" and "Incurred Losses" thereof shall reflect only the figures for that PSY, and similarly, the calculation for the second PSY shall be made using the total of the figures for Earned Premiums and Incurred Losses for the first and second PSY. Thus, for the second PSY only, the calculation shall constitute a two year average.)

Profit Share Formula

1) Earned Premiums (total of current and two preceding PSY's) ..... $_____
2) Total Incurred Losses
   a) Incurred Losses (total of current and two preceding PSY's) (No less than zero) ..... $_____
   b) Stop Loss credit or debit (current and two prior PSY's) ..... $_____
   c) Total Incurred Losses ..... $_____
3) Incurred Losses Percentage (#2/#1 x 100) ..... _____ %
4) Adjusted Permissible Incurred Loss Percentage ..... _____ %
5) Gross Profit Percentage (#4 - #3) ..... _____ %
6) Current Year Earned Premium ..... $_____
7) Gross Profit (#5 x #6) ..... $_____
8) Agent's Profit Share Percentage ..... _____ %
9) Preliminary Agent's Profit Share (#7 x #8) ..... $_____
10) Reduction for Delinquencies ..... $_____
11) Preliminary Agent's Profit Share After Delinquencies (#9 - #10) ..... $_____
12) Final Agent's Profit Share (Greater of #11, 3 year OR One year Personal Lines Profit Share Calculations) ..... $_____

B. Formula definitions (numbers refer to numbered items listed under Section A).

1) Earned Premiums are the written premiums on business produced during the PSY minus the unearned premiums as of the end of the same year plus the unearned premiums as of the end of the prior year.

2) Incurred Losses
   a) Incurred Losses are the net losses paid during the PSY plus reserves for unpaid losses as of the end of the same year and minus reserves for unpaid losses as of the end of the prior year. If a negative total results, a zero total will be used.
   b) Incurred Losses paid or reserved during a PSY shall not, for the purpose of this Profit Sharing Agreement only, include more than the stop loss limitation in effect for that PSY as a result of a single event or any one occurrence. With respect to any loss which exceeds such stop loss limitation and which has not been paid or closed at the end of the current PSY, if any adjustment of reserve or other credit shall reduce the loss to an amount below said stop loss limitation in the PSY, Agent's Incurred Losses shall be reduced only by a sum equal to the difference between said stop loss limitation and the amount of the loss at the end of the current PSY. No reduction in Incurred Losses shall be allowed in the amount of that portion of any reserve adjustment or other credit by which any loss exceeds said stop loss limitation. In addition, when Incurred Losses are calculated for any PSY in which a loss is paid or closed, such Incurred Losses shall be increased

by that portion of any reduction in reserve or other credit which exceeds the stop loss limitation and for which Agent received credit in any prior PSY. In each year, the stop loss limitation shall increase or decrease by a percentage equal to the percentage increase or decrease in the direct written premiums of the property and casualty industry in the United States excluding the industry totals for the fidelity and surety lines as published by insurance industry financial reporting service for the calendar year two years prior to such Profit Sharing Year ("Industry Annual Adjustment Factor"). Each year Company shall notify the Agent of the percentage increase or decrease as soon as practicable after the Company receives summary data. This percentage increase or decrease will be cumulative. However, the amount of the stop loss limitation shall never be less than that which is in effect for the first PSY hereunder. Company will, at its discretion, establish the dollar amount of the stop loss limitation as is provided for hereunder and advise Agent on an annual basis of such amount. The foregoing notwithstanding, in the case of any loss or losses which are incurred during any PSY as a result of any single "catastrophe", as determined by Company, the stop loss limitation to be applied will equal the greater of twenty-five percent (25%) of Earned Premiums for such PSY or the amount of the single occurrence stop loss limitation as it shall be calculated for such PSY according to the terms of this paragraph.

o) Total Incurred Losses is the sum of Incurred Losses and the stop loss credit or debit, if any.

3) Incurred Losses Percentage is calculated by dividing the Total Incurred Losses by the Earned Premiums and multiplying by 100.

4) Adjusted Permissible Incurred Loss Percentage is a percentage figure between 58% and 65% which is determined based on Agent's actual commission dollars paid in the PSY. Business written at lower commission levels will cause the permissible loss ratio to be adjusted upward and business written at higher commission levels will cause the permissible loss ratio to be adjusted downward.

5) Gross Profit Percentage is calculated by subtracting the Incurred Losses Percentage from the Adjusted Permissible Incurred Loss Percentage. If the difference is zero or negative, no further Profit Share calculation will be made.

6) Current Year Earned Premium is Earned Premium for the calendar year in which the Profit Share calculation is being made.

7) Gross Profit is calculated by multiplying Current Year Earned Premiums by the Gross Profit Percentage.

8) Agent's Profit Share Percentage.

			Agent's Profit Share Percentage		
			1Year **	2 Year **	3 Year**
Current PSY Written Premium*			Payout %	Payout %	Payout %
0	to	399,999	15%	20%	30%
400,000	to	474,999	20%	25%	35%
475,000	to	549,999	25%	30%	40%
550,000	to	649,999	30%	35%	45%
650,000	to	Over	35%	42%	50%

*Written Premium is personal lines premium written by Agent in Company except those applicable to flood, umbrellas, assigned risk insurance policies, earthquake, fidelity and surety bonds and fees applicable to the Michigan Catastrophic Claims Associations ("MCCA"). Written Premium is subject to annual changes based on the Industry Annual Adjustment Factor as determined by Company. Each year Company shall notify the Agent of the percentage increase or decrease as soon as practicable after Company receives summary data. This percentage increase or decrease will be cumulative.

**The "Year Payout" column used corresponds to the number of years experience utilized in calculating the Profit Share formula as explained in Section I(A).

9) Preliminary Agent's Profit Share is determined by multiplying Gross Profit by the applicable Agent's Profit Share percentage.

10) Reduction for Delinquencies is calculated as a reduction of Preliminary Agent's Profit Share by 8% for each month during the PSY that Agent's account(s) with Company is(are) delinquent pursuant to the terms of the Agency Agreement.

11) Preliminary Agent's Profit Share After Delinquencies shall be calculated by subtracting any Reduction for Delinquencies from Preliminary Agent's Profit Share.

12) Final Agent's Profit Share is the greater of Preliminary Agent's Profit Share After Delinquencies calculations under this Agreement or Agent's one year profit share calculated under Alternative Addendum A.

II. **Other Provisions.**

A. The foregoing calculations shall be made annually by Company for the current PSY as soon after December 31 thereof as is reasonably practicable.
B. Company records shall be considered binding and conclusive as to all information pertaining to this Agreement.
C. Profit Share, if any, is not payable unless Agent has complied with all the terms of the Agency Agreement and Marketing Agreement. Agent shall neither deduct from its account(s) nor in any other manner anticipate Profit Share.
D. This Agreement shall continue until terminated (1) by either Party upon written notice to the other, (2) by agreement of the Parties, or (3) by termination of the Marketing Plan or Agency Agreement. In the event of termination of this Agreement, a final Profit Share calculation shall be made and a final Profit Share shall be paid (if applicable) for the PSY in which termination notice is given but not prior to the time such final Profit Share would have otherwise been calculated or paid had this Agreement not terminated. The foregoing notwithstanding, if this Agreement terminates and Agent retains or has put in place another Company profit share agreement which includes personal lines business, profit share will only be paid pursuant to the retained or new profit share agreement and no profit share will be paid under this Agreement.
E. This Agreement or rights hereunder are not assignable without Company's written permission.
F. This Agreement may be altered or amended by Company, unilaterally and at any time, by mailing written notice thereof to Agent. Any such notice must be mailed at least 90 days prior to the beginning of the PSY during which the change is to be effective, except that annual changes based on the Industry Annual Adjustment Factor will be communicated to Agent as soon as practicable.
G. The calculation of Agent's Profit Share hereunder shall include all personal lines premiums, losses, and loss reserves chargeable to Agent by Company except those applicable to flood, nonstandard auto, umbrella policies, assigned risk policies, earthquake, fidelity and surety bonds, and Michigan Catastrophic Claims Association.

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ALTERNATIVE ADDENDUM A
One Year Personal Lines Profit Sharing Agreement

As consideration for the execution on even date herewith of the Marketing Plan between Agent and Company, said parties hereby enter this Alternative Personal Lines Profit Sharing Agreement to be effective January 1, 2004.

I. **Profit Sharing.**
To compensate Agent for exercising skill, caution, and diligence in the selection of risks insured by Company, Company will pay to Agent a "Profit Share" (as hereinafter defined and calculated) based on "Gross Profit" (as hereinafter defined) realized by Company on business written by Agent under said Agency Agreement referenced in the Marketing Plan. The Profit Share shall be calculated using the following formula for each "Profit Sharing Year" (as hereinafter defined).

A. Method and formula. A "Profit Sharing Year" (PSY) shall be defined as the accounting period extending from January 1 through December 31 of each calendar year during which this Agreement is in effect. The calculation of any Profit Share earned by Agent pursuant to this Agreement for any PSY shall be made according to the following Profit Share Formula.

Profit Share Formula

1) Earned Premiums (current year) ..... $_____
2) Incurred Losses
   a) Incurred Losses (no less than zero) ..... $_____
   b) Stop Loss Credit or Debit ..... $_____
   c) Total Incurred Losses ..... $_____
3) Incurred Losses Percentage
   a) Incurred Losses Percentage (#2/#1 x 100) ..... _____%
   b) Uniform Loss Development Percentage ..... _____%
   c) Total Incurred Losses Percentage ..... _____%
4) Gross Profit Percentage (56.0% - #3) ..... _____%
5) Gross Profit (#1 x #4) ..... $_____
6) Agent's Profit Share (____% x #5) ..... $_____
7) Reduction for Delinquencies ..... $_____
8) Preliminary Agent's Profit Share After Delinquencies (#6 - #7) ..... $_____
9) Final Agent's Profit Share ..... $_____

B. Formula definitions (numbers refer to numbered items listed under Section A).

1) Earned Premiums are defined as the written premiums on business produced by Agent during the Profit Sharing Year minus the unearned premiums as of the end of the same year plus the unearned premiums as of the end of the prior year.

2) Incurred Losses
   (a) Incurred Losses are defined as the net losses paid during the Profit Sharing Year plus reserves for unpaid losses as of the end of the same year and minus reserves for unpaid losses as of the end of the prior year. If a negative total results, a zero total will be used.
   (b) Incurred Losses paid or reserved during a Profit Sharing Year shall not, for the purpose of this Profit Sharing Agreement only, include more than the stop loss limitation in effect for the Profit Sharing Year as a result of a single event or any one occurrence. With respect to any loss which exceeds such stop loss limitation and which has not been paid or closed at the end of the current PSY, if any adjustment of reserve or other credit shall reduce the loss to an amount below said stop loss limitation in the PSY, Agent's Incurred Losses shall be reduced only by a sum equal to the difference between said stop loss limitation and the amount of the loss at the end of the current PSY. No reduction in Incurred Losses shall be allowed in the amount of that portion of any reserve adjustment or other credit by which any loss exceeds said stop loss limitation. In addition, when Incurred Losses are calculated for any PSY in which a loss is paid or

closed, such Incurred Losses shall be increased by that portion of any reduction in reserve or other credit which exceeds the stop loss limitation and for which Agent received credit in any prior PSY. In each year, the stop loss limitation shall increase or decrease by a percentage equal to the percentage increase or decrease in the direct written premiums of the property and casualty industry in the United States (group 1 and 2) excluding the industry total for fidelity and surety lines as published by insurance industry financial reporting service for the calendar year two years prior to such Profit Sharing Year ("Industry Annual Adjustment Factor"). Each year the Company shall notify Agent of the percentage increase or decrease as soon as practicable after the Company receives summary data. However, the amount of the stop loss limitation shall never be less than that which is in effect for the first PSY hereunder. This percentage increase or decrease will be cumulative. Company shall, at its discretion establish the dollar amount of the stop loss limitation as is provided for hereunder. Company will advise Agent on an annual basis of such amount. In addition, the foregoing notwithstanding, in the case of any loss or losses which are incurred during any PSY as a result of any single "catastrophe", as defined by Company, the stop loss limitation to be applied shall equal the greater of twenty-five percent (25%) of Earned Premiums for such PSY or the amount of the single occurrence stop loss limitation as it shall be calculated for such PSY according to the terms of this paragraph.

c) Total Incurred Losses shall be the sum of Incurred Losses and the stop loss credit or debit, if any.

3) Incurred Losses Percentage
   a) Incurred Losses Percentage is calculated by dividing the Total Incurred Losses by the Earned Premiums and multiplying by 100.
   b) Uniform Loss Development Percentage is a percentage defined by Company and is updated annually.
   c) Total Incurred Losses Percentage is the sum of the Incurred Losses Percentage and Uniform Loss Development Percentage. If such Percentage is greater than 56.0%, no further calculation will be made.

4) Gross Profit Percentage is calculated by subtracting the Total Incurred Losses Percentage from 56.0%.

5) Gross Profit is calculated by multiplying Earned Premiums by the Gross Profit Percentage.

6) Agent's Profit Share shall be calculated by multiplying the Gross Profit by that percentage set forth on Exhibit A hereto. Written premium for the purpose of this calculation step includes all personal and commercial lines premium written by Agent in Company and its affiliate insurance companies except those applicable to flood, umbrellas, assigned risk insurance policies, earthquake fidelity and surety bonds and the Michigan Catastrophic Claims Association. The written premium range will increase or decrease annually based on the percentage increase or decrease in the Industry Annual Adjustment Factor. Each year Company will notify Agent of the percentage increase or decrease as soon as practicable. The percentage increase or decrease will be cumulative.

7) Reduction for Delinquencies is calculated as a reduction of Agent's Profit Share by 8% for each month during the PSY that Agent's account(s) with Company is(are) delinquent pursuant to the terms of the Agency Agreement.

8) Preliminary Agent's Profit Share After Delinquencies shall be calculated by subtracting any Reduction for Delinquencies from Agent's Profit Share.

9) Final Agent's Profit Share is the greater of Preliminary Agent's Profit Share After Delinquencies calculations under this Agreement or Agent's three year profit share calculated under Addendum A.

II. Other Provisions.

A. The foregoing calculations shall be made annually by Company for the current Profit Sharing Year as soon after December 31 thereof as is reasonably practicable.
B. Company records shall be considered binding and conclusive as to all information pertaining to this Agreement.
C. The Profit Share, if any, is not payable unless Agent has complied with all the terms of the Marketing Plan and its Agency Agreement. Agent shall neither deduct from its account(s) nor in any other manner anticipate Profit Share.
D. This Agreement shall continue until terminated (1) by either Party upon written notice to the other, (2) by agreement of the Parties, or (3) by termination of the Marketing Plan or Agency Agreement. In the event of termination of this Agreement, a final Profit Share calculation shall be made and a final Profit Share shall be paid (if applicable) for the PSY in which termination notice is given but not prior to the time such final Profit Share would have otherwise been calculated or paid had this Agreement not terminated. The foregoing notwithstanding, if this Agreement terminates and Agent retains or has put in place another Company profit share agreement which includes personal lines business, profit share will only be paid pursuant to the retained or new profit share agreement and no profit share will be paid under this Agreement.
E. This Agreement or rights hereunder shall not be assignable without Company's express permission.
F. This Agreement may be altered or amended by Company, unilaterally and at any time, by mailing written notice thereof to Agent stating when thereafter such alteration or amendment shall be effective. Any such notice must be mailed at least 90 days prior to the beginning of the PSY during which the alteration or amendment is to be effective, except that annual changes based on the Industry Annual Adjustment Factor will be communicated to Agent as soon as practicable.
G. The calculation of Agent's Profit Share hereunder shall include all personal lines premiums, losses, and loss reserves chargeable to Agent by Company except those applicable to flood, nonstandard auto, umbrella policies, assigned risk policies, earthquake, fidelity and surety bonds, and Michigan Catastrophic Claims Association.
H. Profit Share calculated pursuant to this Addendum A - One Year Alternative shall be due and payable to Agent only when it exceeds the profit share calculated pursuant to Addendum A (three-year calculation) of the Marketing Plan. In such a case, no profit share will then be due and payable pursuant to Addendum A (three-year calculation) of the Marketing Plan.

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ADDENDUM "B" TO MARKETING PLAN
Commercial Lines Profit Sharing Agreement

As consideration for the execution on even date herewith of the Marketing Plan between Agent and Company, said parties hereby enter this Commercial Lines Profit Sharing Agreement effective January 1 of any year in which Agent meets that respective year's minimum threshold ("Commercial Lines Threshold") of personal lines direct written premium placed with Company, excluding flood, nonstandard auto, umbrellas, assigned risk insurance, earthquake and the Michigan Catastrophic Claims Association.

I. **Profit Sharing.**
To compensate Agent for exercising skill, caution, and diligence in the selection of commercial lines risks insured by Company, Company will pay to Agent a "Profit Share" (as hereinafter defined) based on "Gross Profit" (as hereinafter defined) realized by Company on commercial lines business written by Agent under said Agency Agreement referenced in the Marketing Plan. The Profit Share shall be calculated using the following formula for each "Profit Sharing Year" (as hereinafter defined).

A. Method and formula. A "Profit Sharing Year" (PSY) is the accounting period extending from January 1 through December 31. The formula is designed to reflect the profitability of the business written by Agent for Company on a three year average which shall include the current PSY (the PSY for which the calculation of profit sharing is being made) and the two PSY's immediately preceding it. (If Agent had no existing agency relationship with Company at the time of the execution of the Agency Agreement, the first PSY calculation of Profit Share shall be made according to the same Formula, but "Commercial Lines Earned Premiums" and "Commercial Lines Incurred Losses" thereof shall reflect only the figures for that PSY, and similarly, the calculation for the second PSY shall be made using the total of the figures for Commercial Lines Earned Premiums and Commercial Lines Incurred Losses for the first and second PSY. Thus, for the second PSY only, the calculation shall constitute a two year average.) Agent's commercial lines business for Company shall be determined from the Company's production records.

Profit Share Formula

(1) Commercial Lines Earned Premiums (for current and two prior PSY's) ..... $_____
(2) Commercial Lines Incurred Losses
  (a) Commercial Lines Incurred Losses (for current and two prior PSY's) ..... $_____
  (b) Stop Loss Credit or Debit (current and two prior PSY's) ... $_____
  (c) Total Commercial Lines Incurred Losses ..... $_____
(3) Incurred Losses Percentage (#2/#1 x 100) ..... _____%
(4) Gross Profit Percentage (45.0% - #3) ..... _____%
(5) Gross Profit (See: I.B.5., current PSY only) ..... $_____
(6) Adjusted Agent's Balances Charged Off ..... $_____
(7) Net Profit (#5 - #6) ..... $_____
(8) Agent's Profit Share (50% x #7) ..... $_____
(9) Reduction for Delinquencies ..... $_____
(10) Final Agent's Profit Share (#8 - #9) ..... $_____

B. Formula Definitions. (Numbers refer to numbered items listed under Section A).
  1. Commercial Lines Earned Premiums are defined as the commercial lines written premiums on business produced during the PSY minus the commercial lines unearned premiums as of the end of the same year plus the commercial lines unearned premiums as of the end of the prior year.
  2. Commercial Incurred Losses
    a) Commercial Lines Incurred Losses are defined as the net losses paid during the PSY plus reserves for unpaid losses as of the end of the same year and minus reserves for unpaid losses as of the end of the prior year. If a negative total results, a zero total will be used.
    b) Such Incurred Losses paid or reserved during a PSY shall not, for the purpose of this Commercial Lines Profit Sharing Agreement only, include more than the stop loss limitation in effect for that PSY as a result of a single event or any one occurrence. With respect to any loss which exceeds such stop loss limitation and which has not been paid or closed at the end of the current PSY, if any adjustment of reserve or other credit shall reduce the loss to an amount below said stop loss limitation in the PSY, Agent's Incurred Losses shall be reduced only by a sum equal to the

difference between said stop loss limitation and the amount of the loss at the end of the current PSY. No reduction in Incurred Losses shall be allowed in the amount of that portion of any reserve adjustment or other credit by which any loss exceeds said stop loss limitation. In addition, when Incurred Losses are calculated for any PSY in which a loss is paid or closed, such Incurred Losses shall be increased by that portion of any reduction in reserve or other credit which exceeds the stop loss limitation and for which Agent received credit in any prior PSY. In each year, the stop loss limitation shall increase or decrease by a percentage equal to the percentage increase or decrease in the direct written premiums of the property and casualty industry in the United States excluding the industry total for Fidelity and Surety lines as published by insurance industry financial reporting services for the two calendar years prior to such PSY ("Industry Annual Adjustment Factor"). Each year Company shall notify Agent of the percentage increase or decrease as soon as practicable after the Company receives summary data. However, the amount of the stop loss limitation shall never be less than that which is in effect for the first PSY hereunder. This percentage increase or decrease will be cumulative. Company shall at its discretion establish the dollar amount of the stop loss limitation as is provided for hereunder. Company will advise Agent on an annual basis of such amount. In addition, the foregoing notwithstanding, in the case of any loss or losses which are incurred during any PSY as a result of any single "catastrophe", as defined by Company, the stop loss limitation to be applied shall equal the greater of twenty-five percent (25%) of Earned Premiums for such PSY or the amount of the single occurrence stop loss limitation as it shall be calculated for such PSY according to the terms of this paragraph.

c) Total Commercial Lines Incurred Losses is the sum of Commercial Lines Incurred Losses and the stop loss credit or debit, if any.

3. Incurred Losses Percentage is calculated by dividing Total Incurred Losses by Earned Premiums and multiplying by 100. If such Percentage is greater than 45.0%, no further calculation will be made.
4. Gross Profit Percentage is calculated by subtracting Incurred Losses Percentage from 45.0%.
5. Gross Profit is calculated by multiplying Earned Premiums, for the current PSY only, by the Gross Profit Percentage.
6. Adjusted Agent's Balances Charged Off shall be the amount of commercial lines premium from Agent's Insureds which Company writes off as uncollectible during the PSY multiplied by 0.45.
7. Net Profit shall be calculated by subtracting the Adjusted Agent's Balances Charged Off from Gross Profit.
8. Agent's Profit Share shall be calculated by multiplying the Net Profit by 50.0%.
9. Reduction for Delinquencies is calculated as a reduction of Agent's Profit Share by 8% for each month during the PSY that Agent's account(s) with Company is(are) delinquent pursuant to the terms of the Agency Agreement.
10. Final Agent's Profit Share shall be calculated by subtracting any Reduction for Delinquencies from Agent's Profit Share.

II. **Other Provisions.**

A. The foregoing calculations shall be made annually by Company for the current PSY as soon after December 31 thereof as is reasonably practicable.

B. Company records shall be considered binding and conclusive as to all information pertaining to this Agreement.

C. The Profit Share, if any, is not payable unless the Agent has complied with all the terms of the Marketing Plan and the Agency Agreement. Agent shall neither deduct from its account(s) nor in any other manner anticipate Profit Share.

D. This Agreement shall continue until terminated (1) by either Party upon written notice to the other, (2) by agreement of the Parties, or (3) by termination of the Marketing Plan or Agency Agreement. In the event of termination of this Agreement, a final Profit Share calculation shall be made and a final Profit Share shall be paid (if applicable) for the PSY in which termination notice is given but not prior to the time such final Profit Share would have otherwise been calculated or paid had this Agreement not terminated. The foregoing notwithstanding, if this Agreement terminates and Agent retains or has put in place another Company profit share agreement which includes commercial lines business, profit share will only be paid pursuant to the retained or new profit share agreement and no profit share will be paid under this Agreement.

E. This Agreement or rights hereunder shall not be assignable without Company's express permission.

F. This Agreement may be altered or amended by Company, unilaterally and at any time, by mailing written notice thereof to the Agent stating when thereafter such alteration or amendment shall be effective. Any such notice must be mailed at least 90 days prior to the beginning of the PSY during which the alteration or amendment is to be effective, except that annual changes based on the Industry Annual Adjustment Factor will be communicated to Agent as soon as practicable.

G. The calculation of Agent's Profit Share hereunder shall include all commercial lines premiums, losses, and loss reserves chargeable to Agent by Company except those applicable to flood, nonstandard auto, umbrella policies, assigned risk policies, earthquake, fidelity and surety bonds, and Michigan Catastrophic Claims Association.

H. Each year Agent must meet the Commercial Lines Threshold for a profit share calculation to be made pursuant to this Addendum B. The Commercial Lines Threshold is subject to annual change based on the Industry Annual Adjustment Factor as determined by Company. Each year Company shall notify Agent of the percentage increase or decrease as soon as practicable. This percentage increase or decrease will be cumulative. Addendum I, Agency Profit Sharing – Property/Casualty, shall be suspended for the PSY effective January 1 of any year in which Agent meets the Commercial Lines Threshold. If the Commercial Lines Threshold is not met, profit share for commercial lines will be calculated under Addendum I. When calculating profit share pursuant to Addendum I any PSY it is in force, the business included in Addendum A and Alternative Addendum A Personal Lines profit share calculations shall not be included in the Addendum I profit share calculation, thereby limiting the calculation to commercial lines, but the annual written premium amounts set forth in the table in Exhibit A to Addendum I shall be those gross commercial lines and personal lines premiums on policies written by Agent, except those applicable to flood, umbrella policies, assigned risk policies, earthquake, fidelity and surety bonds, and Michigan Catastrophic Claims Association, in Company during the profit sharing year less premiums on policies that are canceled and/or returned.

I. Provision II.H. above notwithstanding, in the event Addendum A to the Marketing Plan (the Personal Lines Profit Sharing Agreement) has not been made effective the same year as the year the Marketing Plan is dated, calculations of commercial lines profit share will be made only pursuant to Addendum I, Agency Profit Sharing – Property/Casualty until such PSY in which Addendum A to the Marketing Plan (the Personal Lines Profit Sharing Agreement) is effective.

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OPTION TO PURCHASE AGREEMENT

In consideration of their execution on even date herewith of their Agency Agreement and/or Marketing Plan, Company, as defined in the Agency Agreement and/or Marketing Plan (hereinafter "Company") and _____ (hereinafter "Agent") hereby agree as follows:

WITNESSETH:

1. Agent grants to Company a first right of refusal option to purchase (a) the book of business Agent writes in Company and its affiliated insurance companies ("the Option Book") and (b) Agent's insurance agency business as a going concern ("the Agency"), in the event Agent desires to sell the Option Book or the Agency and receives a bona fide written offer from a third party to purchase the Option Book or the Agency. Agent shall present the written offer to Company, and Company shall have 14 days to notify Agent of Company's decision concerning whether or not to purchase the Option Book or the Agency for a price equal to the bona fide offer from the third party. If Company declines in writing to purchase the Option Book or the Agency or if Company fails to respond to Agent within the 14 day period, Agent may sell the Option Book or the Agency to the third party.

2. Concurrent with the exercise of Company of either option to purchase pursuant to the first right of refusal set forth in paragraph 1 above, and as material consideration for the grant and exercise of this option, Agent will not directly or indirectly for a period of three years (i) in the case of the sale of the Option Book, solicit or disclose to any other person, firm, business entity, or corporation any information related to any of the insureds which constitute the Option Book or their insurance policies or (ii) in the case of the sale of the Agency, solicit or disclose to any other person, firm, business entity, or insurance by the Agency or any information related to said insureds or their insurance policies.

3. Company may assign its rights and obligations under this Option To Purchase Agreement to any of Company's affiliates at its sole discretion.

4. This Option To Purchase Agreement will terminate 60 days after the termination of the Agency Agreement and Marketing Plan referred to above.

Agreed to and effective as of the date set forth above.

Agent	Company
_____	_____
By _____	By _____
Title _____	Title _____

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CORPORATE AGENCY SUPPLEMENT

In Consideration of Company appointing Nield, Inc. DBA Insurance Designers, as Agent, and as inducement, for Company to do so, the undersigned hereby jointly and severally and for their heirs, executors, administrators, successors, and assignees guarantee and bind ourselves to the faithful performance of all obligations, by Agent, to pay any sum due Company by virtue of agency created under said Agreement and which Agent shall fail or refuse to pay when due.

Witness	Individually
Witness	Individually
Witness	Individually

Company:

Nationwide Mutual Insurance Company
Nationwide Insurance Company of America
Nationwide Mutual Fire Insurance Company
Nationwide Property and Casualty Insurance Company
AMCO Insurance Company
Depositors Insurance Company
Allied Property and Casualty Insurance Company
CalFarm Insurance Company

Allied
Insurance

a member of Nationwide Insurance

NOTICE PURSUANT TO FAIR CREDIT REPORTING ACT

RE: Reid, Inc. DBA Insurance Designers
(Agent and Agency)

This notice is to inform you that in connection with your appointment as an agent for any or all of the companies of the Allied Insurance an investigative report from a consumer reporting agency may be obtained. This investigation may include information as to character, general reputation, personal characteristics and mode of living. Additional information as to the nature and scope of any investigation, if one is made, will be furnished to you upon written request.

ACKNOWLEDGEMENT

By: [signature] Insurance Designers
(Agent and Agency)

Date: 11/20/2002

A220 (02-00) 00

ACUITY, A MUTUAL INSURANCE COMPANY AGENCY AGREEMENT

#7269

Agreement made and entered into this 20th day of November, 2007, by and between *ACUITY*, A Mutual Insurance Company, Sheboygan, Wisconsin, hereinafter referred to as "the Company" and Nield, Inc. of Pocatello, Idaho, hereinafter referred to as "the Agent."

WITNESSETH:

WHEREAS, the Company appoints Nield, Inc., as an agent, and

WHEREAS, the Agent accepts said appointment;

NOW, THEREFORE, the Company and Agent agree as follows:

A. Authority of Agent

1. The Agent is an independent contractor, not an employee of the Company and, subject to requirements imposed by law, the terms of this agreement and the underwriting rules and regulations of the Company, is authorized to:
   a. Solicit, receive and transmit to the Company proposals for insurance contracts, all at the Agent's expense, for which a commission is specified in Exhibit A;
   b. Bind and execute insurance contracts per Company guidelines;
   c. Exercise his/her authority personally or through authorized employees;
   d. Represent other companies; and
   e. Exercise exclusive and independent control of his/her time and the conduct of his/her agency.
2. The Agent is **not** authorized to:
   a. Waive or change any of the terms, rates or conditions of any Company policy or contract;
   b. Use anything other than the Company's regularly furnished advertising material without obtaining the written consent of the Company; or
   c. Admit liability or authorize repairs, unless otherwise authorized by the Company in writing.

B. Responsibility of Agent

1. Collect and receipt for premiums and, as full compensation, to receive commission out of premiums so collected as specified. To refund return commissions on policy cancellations or reductions at the same rate at which they were originally retained.
2. Hold all premiums collected by the Agent in trust for the Company and set aside solely for the Company and not use those premiums in any way except for commissions due as provided for in this Agreement.
3. Pay the Company not later than 45 days from the end of the month in which the business was written the premium amount due on non-direct billed business. Differences of opinion over balances due shall not constitute a "failure to pay."
4. Forward to the Company copies of all binders, policies and endorsements issued by the Agency not later than five (5) business days following the inception date of coverage.
5. Provide the usual and customary services of an insurance agent to policyholders insured with the Company and promptly notify the Company of all claims or potential claims of which the Agent has knowledge.
6. Cooperate fully with the Company to facilitate investigation and adjustment of any claim when requested to do so.
7. Promptly notify the Company when the Agent receives notice of the commencement of any legal action against the Company; and, unless previously authorized by the Company, refrain from admitting or denying liability on the part of the Company in connection with any claim or loss.
8. Secure and maintain an errors and omissions professional liability policy with a reputable insurer carrying a liability limit of not less than $500,000 and furnish a copy of the declarations page of such policy to the Company upon request. Provide written notice to the Company of the cancellation, lapse or nonrenewal of its errors and omissions professional liability insurance and, in such event, agree to immediate termination of this agreement.
9. Comply with the applicable state privacy laws which are functionally regulating the minimum privacy standards set out in such laws, including the Gramm-Leach-Bliley Act; and any amendments and revisions thereto.
10. Keep books of account on records pertaining to Company business which shall be open for inspection by the Company upon reasonable notice.
11. Represent the Company by complying with all applicable laws and regulations, including legally required disclosure of compensation from the Company, and employing business practices which are of the highest ethical standards.

C. Responsibility of Company

1. Provide the usual and customary services of an insurance company on behalf of its policyholders, agents and the general public.
2. Direct the investigation, settlement and defense of any claim or action.

D. Billing and Collection of Premiums and Payment of Commissions

1. Commissions on premiums shall be the only compensation the Agent shall accept from any party for the placement of insurance with the Company and shall be paid to the Agent by the Company within 30 days after the end of the month in which such premiums are received and recorded by the Company. The Company may offset the commissions owed the Agent by return commissions owed by the Agent to the Company on unearned premium, on cancelled or nonrenewed policies, and on premiums due the Company that are either uncollectible or referred to a collection agency, whether or not such premiums are collected by the collection agency. The commissions to be paid are set forth in Exhibit A hereto which may be amended from time to time upon notice as set forth in sec. I.1 of General Provisions.
2. If any additional premiums developed by audit cannot be collected by the Agent, the Company shall undertake direct collection and the Agent shall not be responsible for such premium providing the Agent notifies the Company within 45 days of the Company's initial date of billing. No commission shall be paid to the Agent on such premiums collected by the Company.
3. At its election, the Company may assume responsibility for billing and collecting the initial premium when the existing business of the Agent is transferred to a direct-billed program. In that event, the Company shall be responsible for all other premium billing and collection directly related to the current policy term, unless otherwise mutually agreed by the parties.
4. At its election, the Company may apply undistributed commissions as an offset against any monies due the Company by the Agent.
5. If the Agent is in arrears on its monthly statement balance, the Company shall have the option to immediately convert any or all policies to direct bill.
6. The omission of any item(s) from a monthly statement shall not affect the reponsibility of either

party to account for and pay all amounts due the other, nor shall it prejudice the rights of either party to collect all such amounts from the other.

E. Indemnification

1. The Company shall indemnify and hold the Agent harmless from all civil liability, including attorney fees and costs of investigation and defense, arising as a direct result of:
   a. A Company error, act or omission, except to the extent the Agent has caused such error, act or omission;
   b. Failure of an insured to receive notice of cancellation, nonrenewal or any other notice affecting coverage where such notices are sent directly to the insured by the Company; and
   c. Any action or inaction of the Agent based upon the Agent's use of forms supplied by the Company, or following instructions or procedures established by the Company, except to the extent the Agent has caused such failure. The Agent shall promptly notify the Company upon receiving notice of the commencement of any action related to such liabilities and the Company shall be entitled to participate in, or to assume the defense of, such action. If the Company assumes the defense, it shall not be liable to the Agent for any legal or other expense subsequently incurred by the Agent in connection with such action without the Company's approval.
2. The Agent shall indemnify and hold the Company harmless from all liability arising out of the Agent's error, act or omission except to the extent the Company has caused such error, act or omission.

F. Termination

This Agreement may be terminated at any time upon the mutual agreement of the parties or as follows:

1. By the Company, immediately, if (i) the Agent's license to solicit insurance is suspended or revoked by any government authority having competent jurisdiction; (ii) the Agent fails to comply with the laws of any state in which the Agent is licensed to solicit insurance; (iii) the Agent becomes insolvent, is adjudged bankrupt, files or has filed against it any petition under any Federal bankruptcy law or state insolvency law, has a receiver appointed for its business or property, makes an assignment for the benefit of creditors, or fails to pay the Company promptly for any indebtedness due it, provided the Agent has been given written notice of such indebtedness.
2. By the Company, upon fifteen (15) days written notice to the Agent, if the Agent:
   a. Transfers or assigns this Agreement without the prior written consent of the Company; or
   b. Makes a change in the ownership, control or full-time active management of the Agent without the prior written consent of the Company.
3. By either party, for any reason, upon 90 days written notice or as otherwise required by applicable state law.

G. Rights and Responsibilities Upon Notice of Termination

1. The Agent's authority to solicit, bind or execute contracts of insurance for any new business on behalf of the Company will cease on the date notice of termination of this Agreement is given.
2. The Company agrees to continue unexpired policies in force until expiration, subject to earlier termination in accordance with the Company's underwriting and other standards.
3. The Agent is authorized to service unexpired insurance policies and to bind policy endorsements granting additional coverage only if they meet with the Company's normal underwriting requirements, and also arrange for appropriate underwriting, claim, engineering, premium audit and other necessary Company services on such policies.
4. The Agent having promptly accounted for and paid over premiums for which it may be liable, the Agent's records, use and control of expirations shall remain the property of the Agent and be left in his/her undisputed possession; otherwise the amount of indebtedness shall constitute a lien against the value of the expirations. If in disposing of such records and expirations the Company does not realize sufficient money to discharge in full the Agent's indebtedness to the Company, the Agent shall remain liable for the balance of such indebtedness. Any amount realized in excess of indebtedness, less expense of disposing of such records and expirations, shall be returned to the Agent.
5. In any case where the Company, with permission of the Agent, renews a policy with the agent after termination of this agreement, the regular and usual commissions will be paid on this business except that no contingency commission will be applicable to the same.
6. The Agent shall promptly return any unused applications, Company supplies or other indicia of agency authority furnished by the Company to the Agent immediately upon termination.

H. Changes in Ownership, Management or Control of Agent

1. This Agreement is entered into by the Company with the Agent because the person(s) identified as the owners, managers and those who have signed this Agreement are especially suited to carry out its terms and conditions. The Agent may not change the ownership, management or control of the Agent without the Company's express written consent thereto.
2. The Agent may not transfer or assign this Agreement without the Company's express written consent thereto.

I. General Provisions

1. This Agreement may be revised by the Company after it gives the Agent at least 90 days notice setting forth the proposed revision and its effective date.
2. Whenever written notice is required by this Agreement, it shall be mailed in an envelope addressed to the Agent or the Company (as appropriate) and be separate and apart from any other unrelated notice or correspondence.
3. No failure to insist on strict compliance with any term of this Agreement shall constitute a waiver or relinquishment of the right to insist upon such compliance at any other time.
4. No waiver by either party of any breach by the other of the provisions of this Agreement shall be considered a waiver of any other or subsequent breach.
5. If a conflict exists as to which of two or more duly appointed agents are authorized to represent an existing or prospective policyholder, a written statement signed by the policyholder designating the agent may be relied upon by the Company to determine the servicing agent. The Company, at its sole discretion, shall determine which agent is entitled to receive commissions with respect to such conflict.
6. This Agreement replaces and supersedes all agency agreements, written or oral, which may have existed between the Agent and the Company and constitutes the full agreement between the parties.
7. This Agreement shall be interpreted and con-

strued under the laws of the State of Wisconsin.

8. Exclusive jurisdiction over any litigation arising out of any dispute under this Agreement or regarding the performance of this Agreement by either party shall be conferred upon the Circuit Court of Sheboygan County, Wisconsin.

This agreement shall be binding upon the heirs, executors, successors and assigns of the parties. In witness whereof, the parties have signed this agreement on the date set forth above.

WITNESSES:

ACUITY, A MUTUAL INSURANCE COMPANY, the Company

By: _____
Authorized Representative

WITNESSES:

NIELD, INC., the Agent

By: _____
Bryan A. Nield, President

TO BE EXECUTED IF AGENCY IS INCORPORATED

In consideration of the Company appointing Nield, Inc., as Agent, and as an inducement to it so to do, Bryan A. Nield jointly and severally guarantee the faithful performance of the obligations assumed by the above named Agent and agree jointly and severally to pay any sum to which said Agent may become liable to the Company by virtue of an agency created by this agreement.

In witness whereof the parties hereto have hereunto set their hands and seals this 17th day of DECEMBER, 20 08.

_____
Bryan A. Nield

M-1481(2-08)

Exhibit A
Schedule of *ACUITY* Commissions

Commercial Lines

	Commission
Bis-Pak®	17½ %
Property	17½
General Liability	17½
Auto	15
ACUITY Edge	12½
Garage	15
Crime & Fidelity	17½
Inland Marine	17½
Umbrella	15

Commission on retrospectively rated policies is based on standard premium, not on the retrospective premium.

Personal Lines

	Commission
Road and Residence®	
Auto and Homeowners	
New business	25 %
Renewal business	12½
Umbrella	15
Recreational Vehicle	15
Auto	
New business	25
Renewal business	10
Homeowners	
Package	15
Monoline	10
Recreational Vehicle	
Cycle-Pak®	15
Rec-Pak	15
Umbrella	15
Liability Policies	15
Dwelling Fire	15
Boatowners	15

ACUITY

Exhibit A
Schedule of Commissions

Commercial Lines

	Commission
Bis-Pak	17½%
Property	17½
General Liability	17½
Auto	15
ACUITY Edge	12½
Garage	15
Crime & Fidelity	17½
Inland Marine	17½
Umbrella	15

Commission on retrospectively rated policies is based on standard premium, not on the retrospective premium.

Personal Lines

	Commission
Auto	
Road & Residence	15%
Per-Pak	15
Monoline	
New business	15
Renewal business	12
All youthful operators	10
Home	
Road & Residence	15
Per-Pak	15
Monoline	10
Other	
Cycle-Pak	15
Rec-Pak	15
Boatowners	15
Umbrella	15
Dwelling Fire	15

ACUITY Contingent Commission Plan

The following are the terms and conditions of participation in the *ACUITY* Contingent Commission Plan (hereinafter referred to as "this Plan") sponsored by *ACUITY*, A Mutual Insurance Company, (hereinafter referred to as "the Company"):

A. Eligibility

This plan is only applicable to a current *ACUITY* agency whose net written premiums on business included within the plan equals or exceeds $300,000 during the twelve months prior to the end of the contingent year.

B. Definitions

1. *Agency IBNR losses* means the agency's specific charge for future loss and allocated loss development costs related to that contingent year.

2. *Contingent Year* means the completed calendar year upon which contingent commissions are calculated according to the provisions of this Plan.

3. *Earned Premiums* are defined as that part of the net written premiums applicable to the expired part of the policy period, as calculated by the Company.

4. *Net Losses and Allocated Loss Adjustments Incurred* are defined as losses and allocated loss expenses paid plus outstanding loss and allocated loss expense reserves at the end of the contingent year, minus the sum of the outstanding loss and allocated loss expense reserves at the end of the preceding year. These losses are further limited by any applicable loss limitation.

5. *Net Written Premiums* are defined as the agency's written premiums on the Company's records, less reductions for business which is not included within this plan.

C. General Conditions

1. The Company shall not be liable for any contingent commission payable hereunder if there is any breach by the agency of the *ACUITY* Agency Agreement.

2. The agency shall make no deduction from the agency's account(s) with Company and shall not otherwise anticipate any contingent commission payable hereunder.

3. When any notice of termination of the agent's *ACUITY* Agency Agreement occurs during the contingent year, the affected agency is no longer eligible for contingent commission in either the current or subsequent contingent years.

4. The agency may not assign any or all interest in this Plan without the Company's express, written consent thereto.

5. The Company may amend or terminate this Plan at any time upon mailing to the agency written notice thirty (30) days prior to the effective date of such amendment or termination.

6. The Company's records shall be the conclusive basis for determining the contingent commission payable hereunder.

7. Contingent commission payable under this Plan shall be computed by the Company and remitted to the agency as soon as practicable after the close of the calendar year.

8. If the Company has given its express written consent to a change in the ownership, management or control of the agency and the business of the agency is acquired by, merged into, or consolidated with the business of a successor agency prior to July 1 of the contingent year, the predecessor agency's results shall be included with the successor agency's business and a contingent commission payable shall be determined upon the basis of the combined results and payable to the successor organization. Agencies that merge after July 1 of the contingent year will be treated as separate agencies under this Plan until the following contingent year.

9. The failure of the Company to enforce or apply at any time any of the provisions of this Plan shall in no way be construed to be a waiver of such provisions, nor shall it in any way affect the right of the Company thereafter to enforce or to apply each and every such provision.

10. Contingent commission earned under this Plan shall be paid only if all agency monthly account balances due have been paid to the Company.

11. The calculation of contingent commission under this Plan does not include the following business:

    a. Retrospectively Rated Accounts
    b. Assigned Risk
    c. Association or Safety Group Plans

    The calculation of contingent commission under this Plan includes Greatway. However, the agency may exclude Greatway from this Plan. The option to do so must be received by the Company in writing. This exclusion will remain in effect unless subsequently rescinded in writing. Any such notification received in the current year will be effective for the following contingent year calculations.

D. Contingent Commission Calculation

The contingent commission shall be based upon the percentage of net profit from applicable business produced by the agency during the contingent year. The contingent commission shall be computed as of December 31 as follows:

1. Calculation of Agency Net Profit

Income

Earned premiums for contingent year	$ _____	
Amounts charged for agency IBNR losses in the preceding year	_____	
Total Income		$ _____

Expenses

All commissions (excluding contingent commissions) incurred on net written premiums	_____	
Net losses and allocated loss adjustment expenses incurred (subject to a minimum which equals 25% of earned premium)	_____	
Agency IBNR losses for contingent year	_____	
Administrative expense (21% of agency net earned premiums)	_____	
Workers' Compensation dividends paid out by the Company during contingent year	_____	
Total expenses		_____
Net profit		$ _____

2. Percentage of Profit Calculation

The percentage of net profit is determined by the schedule below.

Net Written Premium	Growth								
	-15.0% and lower	-14.9% to -10.0%	-9.9% to -5.0%	-4.9% to -0.1%	0.0% to 4.9%	5.0% to 9.9%	10.0% to 14.9%	15.0% to 19.9%	20.0% and higher
Over $ 300,000	3%	5%	7%	9%	11%	13%	15%	17%	19%
Over $ 500,000	3%	5%	7%	10%	12%	14%	16%	19%	21%
Over $ 1,000,000	4%	6%	8%	12%	14%	16%	18%	21%	23%
Over $ 2,000,000	5%	7%	9%	13%	16%	18%	20%	23%	25%
Over $ 3,000,000	6%	9%	11%	15%	18%	20%	22%	25%	27%
Over $ 4,000,000	7%	10%	12%	17%	20%	22%	24%	27%	29%
Over $ 5,000,000	9%	12%	14%	19%	22%	25%	27%	29%	31%
Over $ 6,000,000	10%	14%	16%	21%	24%	27%	29%	31%	33%
Over $ 7,000,000	12%	16%	18%	23%	26%	29%	31%	34%	36%
Over $ 8,000,000	13%	17%	20%	25%	28%	31%	33%	36%	38%
Over $ 9,000,000	14%	19%	22%	27%	30%	33%	35%	38%	41%
Over $10,000,000	15%	20%	23%	28%	32%	35%	37%	41%	45%

3. Penalty Provision

The contingent commission otherwise payable under this Plan shall be reduced by one-twelfth for each month during the contingent year in which the agency has a past due balance with the Company.

4. Loss Limitation

Each loss, including allocated loss adjustment expenses, will be subject to a limitation of $350,000 in any one occurrence. If the salvage or subrogation recovery or adjustment of a reserve reduces the loss to below the loss limitation a credit shall be allowed equal to the difference between the loss limitation and the loss recorded on the Company records at the end of the contingent year in which salvage or subrogation was recovered or adjustment of a reserve was made. Multiple losses from any one event or occurrence, including a weather-related event or occurrence, is not aggregated as a single loss subject to the loss limitation.

5. Loss Ratio Lock-In Provision

The agency may elect to lock in the loss ratio as of September 30 of the contingent year. The request must be in writing and be received by the Company no later than October 8 of the contingent year. If this option is elected, the agency's net losses as a percentage of earned premium as of September 30 will remain fixed until December 31 of the contingent year. The net losses and allocated loss adjustment expenses incurred will remain subject to a minimum which equals 25% of the earned premium. Should the agency choose this option, the Company will pay 80% of the contingent commission otherwise earned in this Plan.

ACUITY Contingent Commission Plan

The following are the terms and conditions of participation in the *ACUITY* Contingent Commission Plan (hereinafter referred to as "this Plan") sponsored by *ACUITY*, A Mutual Insurance Company (hereinafter referred to as "the Company"):

A. Eligibility

This plan is only applicable to a current *ACUITY* agency whose net written premiums on business included within the plan equals or exceeds $300,000 during the twelve months prior to the end of the contingent year.

B. Definitions

1. *Agency IBNR losses* means the agency's specific charge for future loss and allocated loss development costs related to that contingent year.

2. *Contingent Year* means the completed calendar year upon which contingent commissions are calculated according to the provisions of this Plan.

3. *Earned Premiums* are defined as that part of the net written premiums applicable to the expired part of the policy period, as calculated by the Company.

4. *Net Losses and Allocated Loss Adjustments Incurred* are defined as losses and allocated loss expenses paid plus outstanding loss and allocated loss expense reserves at the end of the contingent year, minus the sum of the outstanding loss and allocated loss expense reserves at the end of the preceding year. These losses are further limited by any applicable loss limitation.

5. *Net Written Premiums* are defined as the agency's written premiums on the Company's records, less reductions for business which is not included within this plan.

C. General Conditions

1. The Company shall not be liable for any contingent commission payable hereunder if there is any breach by the agency of the *ACUITY* Agency Agreement.

2. The agency shall make no deduction from the agency's account(s) with Company and shall not otherwise anticipate any contingent commission payable hereunder.

3. When any notice of termination of the agent's *ACUITY* Agency Agreement occurs during the contingent year, the affected agency is no longer eligible for contingent commission in either the current or subsequent contingent years.

4. The agency may not assign any or all interest in this Plan without the Company's express, written consent thereto.

5. The Company may amend or terminate this Plan at any time upon mailing to the agency written notice thirty (30) days prior to the effective date of such amendment or termination.

6. The Company's records shall be the conclusive basis for determining the contingent commission payable hereunder.

7. Contingent commission payable under this Plan shall be computed by the Company and remitted to the agency as soon as practicable after the close of the calendar year.

8. If the Company has given its express written consent to a change in the ownership, management or control of the agency and the business of the agency is acquired by, merged into, or consolidated with the business of a successor agency prior to July 1 of the contingent year, the predecessor agency's results shall be included with the successor agency's business and a contingent commission payable shall be determined upon the basis of the combined results and payable to the successor organization. Agencies that merge after July 1 of the contingent year will be treated as separate agencies under this Plan until the following contingent year.

9. The failure of the Company to enforce or apply at any time any of the provisions of this Plan shall in no way be construed to be a waiver of such provisions, nor shall it in any way affect the right of the Company thereafter to enforce or to apply each and every such provision.

10. Contingent commission earned under this Plan shall be paid only if all agency monthly account balances due have been paid to the Company.

11. The calculation of contingent commission under this Plan does not include the following business:

    a. Restrospectively Rated Accounts
    b. Assigned Risk
    c. Association or Safety Group Plans

    The calculation of contingent commission under this Plan includes Greatway. However, the agency may exclude Greatway from this Plan. The option to do so must be received by the Company in writing. This exclusion will remain in effect unless subsequently rescinded in writing. Any such notification received in the current year will be effective for the following contingent year calculations.

D. Contingent Commission Calculation

The contingent commission shall be based upon the percentage of net profit from applicable business produced by the agency during the contingent year. The contingent commission shall be computed as of December 31 as follows:

1. Calculation of Agency Net Profit

Income

Earned premiums for contingent year	$ _____	
Amounts charged for agency IBNR losses in the preceding year	_____	
Total Income		$ _____

Expenses

All commissions (excluding contingent commissions) incurred on net written premiums	_____	
Net losses and allocated loss adjustment expenses incurred (subject to a minimum which equals 25% of earned premium)	_____	
Agency IBNR losses for contingent year	_____	
Administrative expense (21% of agency net earned premiums)	_____	
Workers' Compensation dividends paid out by the Company during contingent year	_____	
Total expenses		_____
Net profit		$ _____

2. Percentage of Profit Calculation

The percentage of net profit is determined by the schedule below.

Net Written Premium		Growth								
		-15.0% and lower	-14.9% to -10.0%	-9.9% to -5.0%	-4.9% to -0.1%	0.0% to 4.9%	5.0% to 9.9%	10.0% to 14.9%	15.0% to 19.9%	20.0% and higher
Over $	300,000	3%	5%	7%	9%	11%	13%	15%	17%	19%
Over $	500,000	3%	5%	7%	10%	12%	14%	16%	19%	21%
Over $	1,000,000	4%	6%	8%	12%	14%	16%	18%	21%	23%
Over $	2,000,000	5%	7%	9%	13%	16%	18%	20%	23%	25%
Over $	3,000,000	6%	9%	11%	15%	18%	20%	22%	25%	27%
Over $	4,000,000	7%	10%	12%	17%	20%	22%	24%	27%	29%
Over $	5,000,000	8%	11%	13%	19%	22%	25%	27%	29%	31%
Over $	6,000,000	9%	12%	15%	21%	23%	26%	28%	30%	32%
Over $	7,000,000	10%	13%	16%	22%	24%	27%	29%	31%	34%
Over $	8,000,000	11%	14%	17%	23%	26%	29%	31%	33%	36%
Over $	9,000,000	12%	15%	18%	24%	28%	31%	33%	35%	38%
Over $	10,000,000	13%	16%	19%	25%	30%	33%	35%	37%	40%

3. Penalty Provision

The contingent commission otherwise payable under this Plan shall be reduced by one-twelfth for each month during the contingent year in which the agency has a past due balance with the Company.

4. Loss Limitation

Each loss, including allocated loss adjustment expenses, will be subject to a limitation of $350,000 in any one occurrence. If the salvage or subrogation recovery or adjustment of a reserve reduces the loss to below the loss limitation a credit shall be allowed equal to the difference between the loss limitation and the loss recorded on the Company records at the end of the contingent year in which salvage or subrogation was recovered or adjustment of a reserve was made. Multiple losses from any one event or occurrence, including a weather-related event or occurrence, is not aggregated as a single loss subject to the loss limitation.

5. Loss Ratio Lock-In Provision

The agency may elect to lock in the loss ratio as of September 30 of the contingent year. The request must be in writing and be received by the Company no later than October 8 of the contingent year. If this option is elected, the agency's net losses as a percentage of earned premium as of September 30 will remain fixed until December 31 of the contingent year. The net losses and allocated loss adjustment expenses incurred will remain subject to a minimum which equals 25% of the earned premium. Should the agency choose this option, the Company will pay 80% of the contingent commission otherwise earned in this Plan.

ACUITY Contingent Commission Plan

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A. Eligibility

This plan is only applicable to a current *ACUITY* agency whose net written premiums on business included within the plan equals or exceeds $300,000 during the twelve months prior to the end of the contingent year.

B. Definitions

1. *Agency IBNR losses* means the agency's specific charge for future loss and allocated loss development costs related to that contingent year.

2. *Contingent Year* means the completed calendar year upon which contingent commissions are calculated according to the provisions of this Plan.

3. *Earned Premiums* are defined as that part of the net written premiums applicable to the expired part of the policy period, as calculated by the Company.

4. *Net Losses and Allocated Loss Adjustments Incurred* are defined as losses and allocated loss expenses paid plus outstanding loss and allocated loss expense reserves at the end of the contingent year, minus the sum of the outstanding loss and allocated loss expense reserves at the end of the preceding year. These losses are further limited by any applicable loss limitation.

5. *Net Written Premiums* are defined as the agency's written premiums on the Company's records, less reductions for business which is not included within this plan.

C. General Conditions

1. The Company shall not be liable for any contingent commission payable hereunder if there is any breach by the agency of the *ACUITY* Agency Agreement.

2. The agency shall make no deduction from the agency's account(s) with the Company and shall not otherwise anticipate any contingent commission payable hereunder.

3. When any notice of termination of the agent's *ACUITY* Agency Agreement occurs during the contingent year, the affected agency is no longer eligible for contingent commission in either the current or subsequent contingent years.

4. The agency may not assign any or all interest in this Plan without the Company's express, written consent thereto.

5. The Company may amend or terminate this Plan at any time upon mailing to the agency written notice thirty (30) days prior to the effective date of such amendment or termination.

6. The Company's records shall be the conclusive basis for determining the contingent commission payable hereunder.

7. Contingent commission payable under this Plan shall be computed by the Company and remitted to the agency as soon as practicable after the close of the calendar year.

8. If the Company has given its express written consent to a change in the ownership, management or control of the agency and the business of the agency is acquired by, merged into, or consolidated with the business of a successor agency prior to July 1 of the contingent year, the predecessor agency's results shall be included with the successor agency's business and a contingent commission payable shall be determined upon the basis of the combined results and payable to the successor organization. Agencies that merge after July 1 of the contingent year will be treated as separate agencies under this Plan until the following contingent year.

9. The failure of the Company to enforce or apply at any time any of the provisions of this Plan shall in no way be construed to be a waiver of such provisions, nor shall it in any way affect the right of the Company thereafter to enforce or to apply each and every such provision.

10. Contingent commission earned under this Plan shall be paid only if all agency monthly account balances due have been paid to the Company.

11. The calculation of contingent commission under this Plan does not include the following business:

    a. Restrospectively Rated Accounts
    b. Assigned Risk
    c. Association or Safety Group Plans

    The calculation of contingent commission under this Plan includes Greatway. However, the agency may exclude Greatway from this Plan. The option to do so must be received by the Company in writing. This exclusion will remain in effect unless subsequently rescinded in writing. Any such notification received in the current year will be effective for the following contingent year calculations.

D. Contingent Commission Calculation

The contingent commission shall be based upon the percentage of net profit from applicable business produced by the agency during the contingent year. The contingent commission shall be computed as of December 31 as follows:

1. Calculation of Agency Net Profit

Income

Earned premiums for contingent year	$ _____	
Amounts charged for agency IBNR losses in the preceding year	_____	
Total Income		$ _____

Expenses

All commissions (excluding contingent commissions) incurred on net written premiums	_____	
Net losses and allocated loss adjustment expenses incurred (subject to a minimum which equals 25% of earned premium)	_____	
Agency IBNR losses for contingent year	_____	
Administrative expense (21% of agency net earned premiums)	_____	
Workers' Compensation dividends paid out by the Company during contingent year	_____	
Total expenses		_____
Net profit		$ _____

2. Percentage of Profit Calculation

The percentage of net profit is determined by the schedule below.

Net Written Premium		Growth								
		-15.0% and lower	-14.9% to -10.0%	-9.9% to -5.0%	-4.9% to -0.1%	0.0% to 4.9%	5.0% to 9.9%	10.0% to 14.9%	15.0% to 19.9%	20.0% and higher
Over $	300,000	3%	5%	7%	9%	11%	13%	15%	17%	19%
Over $	500,000	3%	5%	7%	10%	12%	14%	16%	19%	21%
Over $	1,000,000	3%	5%	7%	11%	13%	15%	17%	20%	22%
Over $	2,000,000	4%	5%	7%	11%	14%	16%	18%	21%	23%
Over $	3,000,000	5%	7%	8%	12%	14%	16%	18%	21%	23%
Over $	4,000,000	5%	8%	9%	13%	15%	17%	18%	21%	23%
Over $	5,000,000	6%	8%	10%	14%	17%	19%	20%	22%	24%
Over $	6,000,000	7%	9%	11%	16%	17%	20%	21%	23%	24%
Over $	7,000,000	8%	10%	12%	17%	18%	21%	22%	24%	26%
Over $	8,000,000	8%	11%	13%	17%	20%	22%	23%	25%	27%
Over $	9,000,000	9%	11%	14%	18%	21%	23%	25%	26%	29%
Over $	10,000,000	10%	12%	14%	19%	23%	25%	26%	28%	30%

ACUITY Contingent Commission Plan

The following are the terms and conditions of participation in the *ACUITY* Contingent Commission Plan (hereinafter referred to as "this Plan") sponsored by *ACUITY*, A Mutual Insurance Company (hereinafter referred to as "the Company"):

A. Eligibility

This Plan is only applicable to a current *ACUITY* agency whose net written premiums on business included within the Plan equals or exceeds $300,000 during the twelve months prior to the end of the contingent year.

B. Definitions

1. *Agency IBNR losses* means the agency's specific charge for future loss and allocated loss development costs related to that contingent year.

2. *Contingent Year* means the completed calendar year upon which contingent commissions are calculated according to the provisions of this Plan.

3. *Earned Premiums* are defined as that part of the net written premiums applicable to the expired part of the policy period, as calculated by the Company.

4. *Net Losses and Allocated Loss Adjustments Incurred* are defined as losses and allocated loss expenses paid plus outstanding loss and allocated loss expense reserves at the end of the contingent year, minus the sum of the outstanding loss and allocated loss expense reserves at the end of the preceding year. These losses are further limited by any applicable loss limitation.

5. *Net Written Premiums* are defined as the agency's written premiums on the Company's records, less reductions for business which is not included within this Plan.

C. General Conditions

1. The Company shall not be liable for any contingent commission payable hereunder if there is any breach by the agency of the *ACUITY* Agency Agreement.

2. The agency shall make no deduction from the agency's account(s) with the Company and shall not otherwise anticipate any contingent commission payable hereunder.

3. When any notice of termination of the agent's *ACUITY* Agency Agreement occurs during the contingent year, the affected agency is no longer eligible for contingent commission in either the current or subsequent contingent years.

4. The agency may not assign any or all interest in this Plan without the Company's express, written consent thereto.

5. The Company may amend or terminate this Plan at any time upon mailing to the agency written notice thirty (30) days prior to the effective date of such amendment or termination.

6. The Company's records shall be the conclusive basis for determining the contingent commission payable hereunder.

7. Contingent commission payable under this Plan shall be computed by the Company and remitted to the agency as soon as practicable after the close of the calendar year.

8. If the Company has given its express written consent to a change in the ownership, management, or control of the agency and the business of the agency is acquired by, merged into, or consolidated with the business of a successor agency prior to July 1 of the contingent year, the predecessor agency's results shall be included with the successor agency's business, and a contingent commission payable shall be determined upon the basis of the combined results and payable to the successor organization. Agencies that merge after July 1 of the contingent year will be treated as separate agencies under this Plan until the following contingent year.

9. The failure of the Company to enforce or apply at any time any of the provisions of this Plan shall in no way be construed to be a waiver of such provisions, nor shall it in any way affect the right of the Company thereafter to enforce or to apply each and every such provision.

10. Contingent commission earned under this Plan shall be paid only if all agency monthly account balances due have been paid to the Company.

11. The calculation of contingent commission under this Plan does not include the following business:

    a. Retrospectively Rated Accounts
    b. Assigned Risk
    c. Association or Safety Group Plans

    The calculation of contingent commission under this Plan includes Greatway. However, the agency may exclude Greatway from this Plan. The option to do so must be received by the Company in writing. This exclusion will remain in effect unless subsequently rescinded in writing. Any such notification received in the current year will be effective for the following contingent year calculations.

D. Contingent Commission Calculation

The contingent commission shall be based upon the percentage of net profit from applicable business produced by the agency during the contingent year. The contingent commission shall be computed as of December 31 as follows:

1. Calculation of Agency Net Profit

Income

Earned premiums for contingent year	$ _____	
Amounts charged for agency IBNR losses in the preceding year	_____	
Total Income		$ _____

Expenses

All commissions (excluding contingent commissions) incurred on net written premiums	_____	
Net losses and allocated loss adjustment expenses incurred (subject to a minimum which equals 25% of earned premium)	_____	
Agency IBNR losses for contingent year	_____	
Administrative expense (21% of agency net earned premiums)	_____	
Workers' Compensation dividends paid out by the Company during contingent year	_____	
Total expenses		_____
Net profit		$ _____

2. Percentage of Profit Calculation

The percentage of net profit is determined by the schedule below.

Net Written Premium		Growth								
		-20.0% to -15.0%	-14.9% to -10.0%	-9.9% to -5.0%	-4.9% to -0.1%	0.0% to 4.9%	5.0% to 9.9%	10.0% to 14.9%	15.0% to 19.9%	20.0% and higher
Over $	300,000	2%	4%	6%	8%	10%	12%	14%	16%	18%
Over $	500,000	2%	4%	6%	9%	11%	13%	15%	18%	20%
Over $	1,000,000	2%	4%	6%	9%	11%	14%	16%	19%	21%
Over $	2,000,000	2%	4%	6%	9%	12%	15%	17%	20%	22%
Over $	3,000,000	3%	5%	6%	10%	13%	15%	17%	20%	22%
Over $	4,000,000	3%	6%	7%	11%	14%	16%	17%	20%	22%
Over $	5,000,000	4%	6%	8%	12%	16%	18%	19%	21%	23%
Over $	6,000,000	5%	7%	9%	13%	16%	19%	20%	22%	23%
Over $	7,000,000	6%	8%	10%	14%	17%	20%	21%	23%	25%
Over $	8,000,000	6%	9%	11%	14%	19%	21%	22%	24%	26%
Over $	9,000,000	7%	9%	12%	15%	20%	22%	24%	25%	27%
Over $	10,000,000	8%	10%	12%	16%	22%	24%	25%	27%	28%

3. Penalty Provision

The contingent commission otherwise payable under this Plan shall be reduced by one-twelfth for each month during the contingent year in which the agency has a past due balance with the Company.

4. Loss Limitation

Each loss, including allocated loss adjustment expenses, will be subject to a limitation of $400,000 in any one occurrence. If the salvage or subrogation recovery or adjustment of a reserve reduces the loss to below the loss limitation, a credit shall be allowed equal to the difference between the loss limitation and the loss recorded on the Company records at the end of the contingent year in which salvage or subrogation was recovered or adjustment of a reserve was made. Multiple losses from any one event or occurrence, including a weather-related event or occurrence, is not aggregated as a single loss subject to the loss limitation.

5. Loss Ratio Lock-In Provision

The agency may elect to lock in the loss ratio as of September 30 of the contingent year. The request must be in writing and be received by the Company no later than October 8 of the contingent year. If this option is elected, the agency's net losses as a percentage of earned premium as of September 30 will remain fixed until December 31 of the contingent year. The net losses and allocated loss adjustment expenses incurred will remain subject to a minimum which equals 25% of the earned premium. Should the agency choose this option, the Company will pay 80% of the contingent commission otherwise earned in this Plan.

ACUITY Contingent Commission Plan

The following are the terms and conditions of participation in the *ACUITY* Contingent Commission Plan (hereinafter referred to as "this Plan") sponsored by *ACUITY*, A Mutual Insurance Company (hereinafter referred to as "the Company"):

A. Eligibility

This Plan is only applicable to a current *ACUITY* agency whose net written premiums on business included within the Plan equals or exceeds $350,000 during the twelve months prior to the end of the contingent year.

B. Definitions

1. *Agency IBNR losses* means the agency's specific charge for future loss and allocated loss development costs related to that contingent year.

2. *Contingent Year* means the completed calendar year upon which contingent commissions are calculated according to the provisions of this Plan.

3. *Earned Premiums* are defined as that part of the net written premiums applicable to the expired part of the policy period, as calculated by the Company.

4. *Net Losses and Allocated Loss Adjustments Incurred* are defined as losses and allocated loss expenses paid plus outstanding loss and allocated loss expense reserves at the end of the contingent year, minus the sum of the outstanding loss and allocated loss expense reserves at the end of the preceding year. These losses are further limited by any applicable loss limitation.

5. *Net Written Premiums* are defined as the agency's written premiums on the Company's records, less reductions for business which is not included within this Plan.

C. General Conditions

1. The Company shall not be liable for any contingent commission payable hereunder if there is any breach by the agency of the *ACUITY* Agency Agreement.

2. The agency shall make no deduction from the agency's account(s) with the Company and shall not otherwise anticipate any contingent commission payable hereunder.

3. When any notice of termination of the agent's *ACUITY* Agency Agreement occurs during the contingent year, the affected agency is no longer eligible for contingent commission in either the current or subsequent contingent years.

4. The agency may not assign any or all interest in this Plan without the Company's express, written consent thereto.

5. The Company may amend or terminate this Plan at any time upon mailing to the agency written notice thirty (30) days prior to the effective date of such amendment or termination.

6. The Company's records shall be the conclusive basis for determining the contingent commission payable hereunder.

7. Contingent commission payable under this Plan shall be computed by the Company and remitted to the agency as soon as practicable after the close of the calendar year.

8. If the Company has given its express written consent to a change in the ownership, management, or control of the agency and the business of the agency is acquired by, merged into, or consolidated with the business of a successor agency prior to July 1 of the contingent year, the predecessor agency's results shall be included with the successor agency's business, and a contingent commission payable shall be determined upon the basis of the combined results and payable to the successor organization. Agencies that merge after July 1 of the contingent year will be treated as separate agencies under this Plan until the following contingent year.

9. The failure of the Company to enforce or apply at any time any of the provisions of this Plan shall in no way be construed to be a waiver of such provisions, nor shall it in any way affect the right of the Company thereafter to enforce or to apply each and every such provision.

10. Contingent commission earned under this Plan shall be paid only if all agency monthly account balances due have been paid to the Company.

11. The calculation of contingent commission under this Plan does not include the following business:

    a. Retrospectively Rated Accounts
    b. Assigned Risk
    c. Association or Safety Group Plans

    The calculation of contingent commission under this Plan includes Greatway. However, the agency may exclude Greatway from this Plan. The option to do so must be received by the Company in writing. This exclusion will remain in effect unless subsequently rescinded in writing. Any such notification received in the current year will be effective for the following contingent year calculations.

D. Contingent Commission Calculation

The contingent commission shall be based upon the percentage of net profit from applicable business produced by the agency during the contingent year. The contingent commission shall be computed as of December 31 as follows:

1. Calculation of Agency Net Profit

Income

Earned premiums for contingent year	$ _____	
Amounts charged for agency IBNR losses in the preceding year	_____	
Total Income		$ _____

Expenses

All commissions (excluding contingent commissions) incurred on net written premiums	_____	
Net losses and allocated loss adjustment expenses incurred (subject to a minimum which equals 25% of earned premium)	_____	
Agency IBNR losses for contingent year	_____	
Administrative expense (21% of agency net earned premiums)	_____	
Workers' Compensation dividends paid out by the Company during contingent year	_____	
Total expenses		_____
Net profit		$ _____

2. Percentage of Profit Calculation

The percentage of net profit is determined by the schedule below.

Net Written Premium		Growth								
		-20.0% to -15.0%	-14.9% to -10.0%	-9.9% to -5.0%	-4.9% to -0.1%	0.0% to 4.9%	5.0% to 9.9%	10.0% to 14.9%	15.0% to 19.9%	20.0% and higher
Over $	350,000	1.5%	3.0%	4.5%	6.0%	7.5%	9.0%	10.5%	12.0%	13.5%
Over $	500,000	1.7%	3.2%	4.7%	6.8%	8.3%	9.8%	11.3%	13.5%	15.0%
Over $	1,000,000	1.9%	3.6%	4.9%	7.0%	8.5%	10.5%	12.0%	14.3%	15.8%
Over $	2,000,000	2.1%	3.8%	5.1%	7.2%	9.0%	11.3%	12.8%	14.8%	16.3%
Over $	3,000,000	2.3%	4.0%	5.3%	7.5%	9.8%	11.5%	13.0%	15.0%	16.5%
Over $	4,000,000	2.5%	4.3%	5.5%	8.3%	10.5%	12.0%	13.2%	15.2%	16.7%
Over $	5,000,000	3.0%	4.7%	6.0%	9.0%	11.8%	13.5%	14.3%	15.8%	17.3%
Over $	6,000,000	3.8%	5.3%	6.8%	9.8%	12.2%	14.3%	15.0%	16.5%	17.7%
Over $	7,000,000	4.3%	6.0%	7.5%	10.5%	12.8%	15.0%	15.8%	17.3%	18.8%
Over $	8,000,000	4.5%	6.8%	8.3%	10.7%	14.3%	15.8%	16.5%	18.2%	19.5%
Over $	9,000,000	5.3%	7.0%	9.0%	11.3%	15.0%	16.5%	18.0%	18.8%	20.3%
Over $	10,000,000	6.0%	7.5%	9.2%	12.0%	16.3%	18.0%	18.8%	20.3%	21.0%

3. Penalty Provision

The contingent commission otherwise payable under this Plan shall be reduced by one-twelfth for each month during the contingent year in which the agency has a past due balance with the Company.

4. Loss Limitation

Each loss, including allocated loss adjustment expenses, will be subject to a limitation of $400,000 in any one occurrence. If the salvage or subrogation recovery or adjustment of a reserve reduces the loss to below the loss limitation, a credit shall be allowed equal to the difference between the loss limitation and the loss recorded on the Company records at the end of the contingent year in which salvage or subrogation was recovered or adjustment of a reserve was made. Multiple losses from any one event or occurrence, including a weather-related event or occurrence, is not aggregated as a single loss subject to the loss limitation.

5. Loss Ratio Lock-In Provision

The agency may elect to lock in the loss ratio as of September 30 of the contingent year. The request must be in writing and be received by the Company no later than October 8 of the contingent year. If this option is elected, the agency's net losses as a percentage of earned premium as of September 30 will remain fixed until December 31 of the contingent year. The net losses and allocated loss adjustment expenses incurred will remain subject to a minimum which equals 25% of the earned premium. Should the agency choose this option, the Company will pay 80% of the contingent commission otherwise earned in this Plan.

Farmers Alliance

Insuring Rural America Since 1888

- ☒ Farmers Alliance Mutual Insurance Company
- ☒ Alliance Insurance Company, Inc.
- ☐ Alliance Indemnity Company

AGENCY AGREEMENT

This Agreement is between the above Companies ("we," "our" and "us") and the Agency ("you," "your") named below.

Agency Name Nield Inc DBA: Insurance Designers

Street Address 4751 S Afton Pl Ste B

City, State, Zip Chubbuck, ID 83202

County Bannock

When this Agreement is signed by all parties, you become our Agent and both you and we agree to all the terms of the Agreement, including any Addendum to it. By becoming our Agent, you do not become our employee. You remain an independent contractor with the right to conduct your business while properly licensed to so act. You shall not have the exclusive right to act on our behalf in your area. This Agreement shall not go into force until signed by the Agent and a duly authorized officer of the Company, and duly recorded at the Company's home office located at 1122 North Main Street, McPherson, Kansas. The terms of this Agreement are strictly confidential. The Agent agrees that he will not exhibit this Agreement or mention its terms to any person or entity.

1. **Agent's Authority**
   While this Agreement is in effect, you have authority to do the following on our behalf:
   A. **Receive Proposals.** You may receive and bind proposals for insurance or bonds. But you may do so only for those types that we have specifically authorized you for, either in writing or as stated in our Company manual.

   B. **Bind Insurance.** You may bind renewals of or changes to policies written and in force with us through you unless this authority is restricted by us in writing.

      Within seven (7) calendar days after you do bind insurance and coverage starts, you will send us written evidence of the coverage.

   C. **Cancel Insurance or Bonds.** You may request cancellation of insurance or bonds written under this Agreement subject to any statute, rule or regulation concerning noncancelable policies.

   D. **Solicitation.** You agree not to solicit any lines of insurance, or receive and bind proposals for insurance or bonds unless you have the required current license or licenses authorizing you to do so.

DEFENDANT'S EXHIBIT 205 ADMITTED

2. **Agent's Duty to Collect and Pay Premiums**
You have the responsibility for collecting all premiums on insurance or bonds that you write or that are written by us for business you produced. After you collect the premiums, you have to pay them to us within the time specified in **Section 3, Agency Billing**. You must pay the premiums yourself if you do not collect them.

A. **When You Do Not Have to Collect or Pay Premiums.** There are only two situations in which you may be excused from your obligation to collect premiums and pay them to us.

1. Direct Billing. If we bill an insured directly, you do not have to collect the premiums. However, if an insured pays you on our behalf for premiums that we billed the insured for directly, you are required to send those monies to us no later than the end of the next business day. On any premiums we return to you that are payable to the insured, you are required to make contact with the insured no later than the end of the next business day.
2. Additional Premiums. In the event that additional premiums are due as the result of a final audit of a policy, not interim audits, you must make all reasonable efforts to collect the premiums. However, if you cannot collect them, we will not require you to pay the premiums yourself if you notify us in writing that you cannot collect them. This written notice must be received in our home office within forty-five (45) days after you receive notice that additional premiums are due as the result of a final audit.

   Failure to notify us in writing within the above forty-five (45) days' time limit means that you will have to pay the uncollected premium yourself.

B. **When We May Try To Collect.** If you do fail to collect any premiums or if you are relieved of your duty to pay premiums, we may try to collect them. We are free to choose the method of collection. If we do collect the premiums, we will not pay you a commission on them. If we cannot collect the premiums, you still have an obligation to pay them unless you were relieved of that obligation by this Agreement **(A.1. and 2. above).**

C. **Monies Are Held In Trust.** You shall hold all monies and securities received on behalf of us in the capacity of a fiduciary as provided by law or regulation. You will, under no circumstances, make any personal or other use of such funds nor commingle any such funds with your personal funds. The fact that you may retain your commissions out of what you collect does not change your status as a trustee.

D. **Disputes over Payment.** Should there be a dispute over payment of premiums, any part of them not in dispute must be paid to us as provided in this Agreement. Only this disputed amount may remain unpaid by you until the matter is resolved, but in no event longer than 120 days.

3. **Agency Billing**
All premiums are due, and must be received in our home office within forty-five (45) days after the last day of the month in which the applicable coverage is effective or is issued by us. All premiums due as the result of an audit are due, and must be received in our home office within forty-five (45) days after the last day of the month in which you receive the bill for the audit premiums.

A. **If You Prepare Own Account.** If you prepare your own account, you must send us your monthly account of the premiums you owe us. This account must reach our home office no later than the 10th day of the month following the month covered by the account.

   Your monthly account must list all premium transactions which took place during that month. It must also show the balance due for that month.

B. **If You Do Not Prepare Own Account.** If you do not prepare your own account, we will send you our monthly statement of the premiums you owe us. You agree to pay the balance shown by the Due Date on the statement, and we will pay any balance that we owe you by the same date.

We may pay the balance either directly to you or by giving you credit against any outstanding balance you owe us.

C. **Omitted Items.** The fact that any item is omitted from a monthly statement or account does not:
- relieve either you or us from the obligation to pay the item when otherwise due;
- affect your right or our right to collect on the item; or
- affect our right to offset against your account.

4. **Direct Billing**

Some of the business you place with us may be on our direct bill system under which we, rather than you, bill the insured for the premium. For direct bill business the following rules apply.

A. Your Name Will Appear. When we send your client any bill or other material related to a policy produced by you, we will put your name on it. Your name will be at least as large as the computer-generated type we use to print the insured's name on the document.

B. You Will Get Copies. We will send you copies of cancellation notices, nonrenewal notices and other insurance documents we send to your clients. You will not receive copies of all invoices we send to your client.

C. You Will Receive Records. When this Agreement ends we will give you a policyholder list if you ask for it and if you are not in default for failure to pay premium balances under this Agreement.

The list will:
- identify all of your clients insured by us;
- identify the months in which insurance expires; or
- contain those details of coverage that normally appear when we print out a policyholder list.

5. **Commissions**

You will receive commissions for business placed with us under this Agreement. You agree that these Commissions will be full compensation for placing the business with us. The rate of your Commissions will be found in our

Schedule of Commissions and will be a part of the Agreement as Addendum A. Any such Commissions due to you will be retained by us to offset any Commissions or Premiums which you owe to us and which are not paid to us in a timely manner as outlined in this Agreement.

6. **When Commissions Must Be Returned**

You agree to return the following to us:
- commissions on insurance or bonds that are cancelled; or
- commissions on the part of any premium that is reduced for any reason, and if we for any reason refund any premium or any part thereof on which you are entitled to a commission under this Agreement.

You shall lose all right to commission on such premium or part thereof and shall pay to us on demand the full amount or part thereof earned by you on such premiums or we may offset against your account.

Commissions must be returned to us at the same rate as they were originally paid by us.

7. **Accounting Differences**
Under certain circumstances, if you do not account for and pay premiums, this Agreement gives us the right to take specific actions involving:
- supplying policyholder lists to you **(Section 4, Direct Billing);**
- the use of expirations **(Section 9, Rights Involving Ownership of Expirations);** or
- termination of this Agreement **(Section 12, Suspending Authority or Terminating Agreement).**

We will not consider that you have failed to account for or pay premiums if the failure involves minor amounts, is caused by routine differences between your accounting records and ours, and is not willful. However, if you do not pay undisputed premiums, we will have the right to take any action permitted under this Agreement.

8. **Overpayment of Compensation**
Any compensation paid to you for premiums later returned or credited to any customer, or any other overpayment of compensation shall be a debt due us from you. In addition to all other rights available to us as a creditor, we shall have the right to deduct such compensation of overpayment from any future compensation due you. We may also balance accounts between our subsidiaries or associate companies. We may apply any agent balance due in one such Company to any other Company of ours at the termination of this Agreement.

9. **Rights Involving Ownership of Expirations**
This part of the Agreement sets forth the rules governing ownership of expirations.

A. **While Agreement Remains In Effect.** While this Agreement is in effect, you own all your expirations (whether Agency billed or direct billed) and all your records of them. We may not use, or authorize anyone else to use, our records of your expirations in order to sell, service or renew any policy we offer unless permitted by this Agreement.

B. **Designation of Agent by Policyholder.** The policyholder must submit to us in writing who will be his Agent. This new Agent will not be responsible for collection of premiums, return premiums, or return commissions, or entitled to commissions until we have processed the change.

C. **After Agreement Is Terminated.** If this agreement is terminated, and you have not properly:
- Accounted for and paid us all premiums for which you are responsible; or
- Given us additional collateral, the value of which is at least equal to, or more than, any premiums you should have paid but have not,

your rights of ownership, use and control of the expirations will pass to us.

We have the right to sell the expirations and records in order to collect what you owe us. We must use reasonable business judgment in the sale. If we sell the items for more than you owe us, we must pay the difference less our expenses to you. On the other hand, if we sell your expirations and records for less than what you owe us, you must pay the difference, plus our expenses in selling these expirations within forty-five (45) days, including interest if applicable.

10. **Indemnification**
You shall indemnify and hold us harmless against all civil liability to the extent you are legally liable to us by statute or common law which is as a direct result of acts or omissions of the agent. And we shall indemnify and hold you harmless against all civil liability, to the extent we are legally liable to you by statute or common law, which are as a direct result of acts or omissions of the companies.

A. **You Must Give Notice.** In order for us to defend and indemnify you, you must give us prompt notice of any action against you involving the situations spelled out above. Our defense and indemnification is strictly conditioned on you giving us prompt and immediate notice of any action against you involving the situation spelled out above.

B. **Control or Defense.** We have the right to investigate, defend or settle any such action. If we do assume the defense, we will not be required to pay you

11. Litigation
You will not take any legal or administrative action in our name or your name in connection with any matter pertaining to our business without the written consent of an executive officer of our Company.

12. **Suspending Authority or Terminating Agreement**
Under certain conditions, your authority under this Agreement itself may be terminated entirely.
   A. **Suspension of Authority.** If you fail to account for premiums or pay them when due, we may suspend your authority to bind coverage, write new or renewal business, and/or change any insurance. Before we take this step we will give you written notice.
   B. **Termination of Agreement.** This Agreement will terminate:
      - automatically if any public authority cancels or does not renew any required license or certificate of authority;
      - automatically on the effective date of the sale, transfer or merger of your business unless we appoint the successor as Agent;
      - automatically if there is an abandonment of the agency;
      - if either party gives the other ninety (90) days' written notice of termination, or for any longer period required by law;
      - immediately when either party gives the other written notice of termination because of fraud, insolvency, willful or gross misconduct or as the law requires on bankruptcy;
      - immediately, or as law requires, for failure to pay balances;
      - immediately with written consent of both parties; or
      - immediately upon the improper use of our policy forms or materials.

13. **The Effects of Termination**
Should this Agreement be terminated, the following rules will apply.

Limited Agency Agreement In Effect. At termination based on ninety (90) days' written notice, or for any longer period required by law, our Limited Agency Agreement will go into effect. Under this Agreement, all outstanding and unexpired insurance and bonds will continue in force, subject to our underwriting standards.

You shall not issue binders, accept new policies, or increase the amounts of insurance or liability on existing policies.

You may collect renewal insurance premiums and countersign annual extension endorsements on policies previously accepted by us.

If insurance you write comes up for renewal during this ninety (90) days or longer period required by law, we will renew it for one more term. However, we do not have to renew any individual policy if:
- premiums have not been paid; or
- in our opinion the insured is not a risk we would cover under our underwriting standards in effect at that time.

And we do not have to renew any insurance at all during the ninety (90) days or any longer period required by law following termination if you have not:
- during that period given us the opportunity to renew any of our insurance or bonds that expired during that period; or
- promptly accounted for any premiums due us and paid to us.

14. **Effect Of Sale or Transfer**
This agreement is not transferable. No rights or interests arising therefrom, including our first and prior security interest, shall be subject to assignment by you except with the written consent of the Company. You agree to give us at least a thirty (30) day advance written notice of any sale or transfer of your business, or merger of it with another business.

When any of these take place, we may choose to:
- sign an Agency Agreement with your successor; or
- enter into a Limited Agency Agreement with your successor, which will govern servicing until expiration of the insurance written under this Agreement.

15. **Waiver**
Neglect on the part of us to enforce any of the provisions of this Agreement shall not be construed as a waiver of any of its rights hereunder unless a written memorandum specifically expressing such waiver is sent to you.

No waiver of rights arising from any failure of performance by you shall modify this Agreement or affect the rights of us arising from any subsequent failure of performance.

16. **Arbitration**
If there is a disagreement over the interpretation or application of any provision of this Agreement, the matter will be submitted to arbitration according to the latest Commercial Arbitration Rules of the American Arbitration Association.

In the absence of any arbitration laws in your state, arbitration under the above provisions shall be governed by the laws of the state of Kansas and its Uniform Arbitration Act.

17. **Validity**
If any part of this Agreement shall be declared or held invalid for any reason, then such invalidity shall not affect any other part of this Agreement and the parts thereof not invalid shall remain in full force and effect.

18. **General**
A. The insurance business being subject to regulation and changing laws, rules and regulations, it is understood that we will prescribe rules, regulations, prices and terms under which it will insure risks, and we retain the right to change, alter or amend such rules, regulations, prices, manuals and terms including the right to limit, restrict or discontinue entering the acceptance or writing of any policies, coverages, lines or kinds of insurance at any time it deems advisable to so do, and without notice to or consent of you, and any such change, alteration, amendment or limitation subject to the existing law shall become effective on the date specified by us.

B. You will maintain a good reputation in the community served and will direct all efforts in the field of insurance toward advancing the business and interest of us to the best of your ability. In the conduct of your business, you will comply with all applicable insurance, consumer and other laws and regulations applicable to your business.

C. The following rules apply while this Agreement remains in effect.
1. Agency Expenses. We will not pay any expenses you incur on your behalf or ours unless they have been previously authorized by us in writing. As an independent contractor, Agent is liable for and will pay all expenses in connection with its business and its insurance agency, including insurance policies or coverages such as the following: Agency Errors and Omissions Coverage, General Liability, Automobile Liability, and Workers' Compensation (when required by law). Agency agrees to submit evidence of this coverage to the Company upon request. Agent will not incur any indebtedness on behalf of the Company represented herein, nor represent that the company is liable directly or indirectly for any such expenses.

2. Supplies. From time to time we will supply you with policies, forms, applications and/or other supplies. Any of them that you do not use remain our property and must be returned to us if we ask. Unauthorized use of these materials is prohibited.
3. Inspection. We have the right to inspect and audit your records on business you do with us. We may do this at any reasonable time at your agency.
4. Loss Payments. Unless we give you specific written authority to do so, you do not have authority to commit us to pay for any loss occurring under any policy or bond.
5. Old Agreements. This Agreement replaces any prior Agency Agreements between you and us.
6. Changing This Agreement. The only way this Agreement may be changed is in writing with at least sixty (60) days notice to you or any longer period required by law or by mutual written agreement.
7. Commission Changes. Any commission in the Schedule of Commissions cannot be changed until it has been in effect for a period of at least one (1) year without your approval.
8. Impact of Laws on Agreement. If applicable law is in conflict with any part of this Agreement, the Agreement will be considered modified to conform with the law. The other provisions will not be affected. In the absence of conflicting laws or regulations, this agreement shall be construed by the laws of the state of Kansas and the rules and regulations thereunder.
9. Binding Agreement. This Agreement shall be binding to you, your heirs, administrators, devises, successors and assigns.

FarmersAlliance

SCHEDULE OF COMMISSIONS

		NEW BUSINESS			RENEWAL
		Until Upload Available	Uploaded (Only applies when upload available for ALL package coverages)	Other than Uploaded (Only applies when upload available for ALL package coverages)	
FARM LINES					
AGRI-RANGE PACKAGE	Farmowners coverages	15	*	*	15
	Personal Automobile	15	*	*	14
	Commercial Automobile	15	*	*	14
	Personal Lines Property	15	*	*	14
OTHER FARM		15	*	*	15
PERSONAL LINES					
AUTOMOBILE	Package with Home, Country Home	n/a	16	14	14
	Monoline	n/a	16	14	12
	Youthful Operator **	10	10	10	10
	Tier 4 or 5 ***	10	10	10	10
PROPERTY		15	*	*	14
COMMERCIAL LINES					
AUTOMOBILE	Package with Other Commercial	15	*	*	14
	Monoline	15	*	*	13
OTHER COMMERCIAL		15	*	*	15

BONDS	NEW BUSINESS	RENEWAL
Fidelity and Forgery	20	20
All Other	30	30

EXCESS POLICIES		NEW BUSINESS	RENEWAL
Personal Excess & Catastrophe Commercial Occurrence Excess	All underlying policies with Farmers Alliance	15	15
	Without Farmers Alliance underlying policy	10	10

* New business commission rates will change to 16% on "Uploaded" applications and 14% on "Other than Uploaded" applications when upload becomes available. Written notification will be provided when upload is available for additional lines of business. "Uploaded" is defined as policies submitted electronically to Farmers Alliance, including electronic submission of down payment.

** Commission percentage applies only to the portion of the auto premium generated by the youthful driver.

*** Commission percentage applies only to the portion of the auto premium generated by the driver assigned to Tier 4 or 5. Applies only to Tiered Personal Auto Program.

AGENCY CONTINGENT COMMISSION

We agree to pay a Contingent Commission as an incentive for a profitable volume of business produced by you. The Contingent Commission will be based upon the ratio of your most recent three-year cumulative incurred losses, plus all uncollected premiums which you have returned to us for collection, to the earned premium for the same three-year cumulative period. The combined results of Farmers Alliance Mutual Insurance Company, Alliance Insurance Company, Inc., and Alliance Indemnity Company will be used in determining the Contingent Commission. Crop insurance premium will be used to meet written premium requirements only. Crop insurance is defined as crop hail insurance, multi-peril crop insurance and grain fire insurance written through Farmers Crop Insurance Alliance, Inc.

The Contingent Commission Program rates are listed below:

3-year Loss Ratio	% of Earned Premium	3-year Loss Ratio	% of Earned Premium
0	5.0	28	3.2
1	5.0	29	3.1
2	5.0	30	3.0
3	5.0	31	2.9
4	5.0	32	2.8
5	5.0	33	2.7
6	5.0	34	2.6
7	5.0	35	2.5
8	5.0	36	2.4
9	5.0	37	2.3
10	5.0	38	2.2
11	4.9	39	2.1
12	4.8	40	2.0
13	4.7	41	1.9
14	4.6	42	1.8
15	4.5	43	1.7
16	4.4	44	1.6
17	4.3	45	1.5
18	4.2	46	1.4
19	4.1	47	1.3
20	4.0	48	1.2
21	3.9	49	1.1
22	3.8	50	1.0
23	3.7	51	0.9
24	3.6	52	0.8
25	3.5	53	0.7
26	3.4	54	0.6
27	3.3	55	0.5

You will qualify for the Contingent Commission Program by compliance with the following requirements:

1. Your annual written premium volume must exceed $125,000 during the calendar year, of which 20% may be crop insurance. If the initial period covers less than twelve (12) months, this minimum requirement of premiums written will be reduced in a pro rata proportion to the number of actual months in the Contingent Commission period.

2. Your account must be paid within the terms specified in the Company-Agency Agreement.

Each calendar year shall be treated as a separate Contingent Commission period. The written premium volume, earned premiums and incurred losses shall be based upon our Home Office records.

In the event your agency is sold, the Buyer shall assume the incurred losses and earned premiums of your agency and same shall be included in Buyer's total for the qualifying period. Any earned Contingent Commission shall be paid to the party owning the agency at the end of the calendar year. Any division of Contingent Commission agreed upon between Buyer and Seller shall be their responsibility and shall not be binding upon us.

Your qualifications for the Contingent Commission Program will be determined by us. Our decision shall be final and no representative, fieldman or agent has the authority to change any provision of the plan.

This Contingent Commission Program shall be effective January 1, 2004, and will supersede all previous Contingent Commission Programs, shall run concurrently with each calendar year, and may be terminated by us at any time upon written notice to you. If the regular Company-Agency Agreement is cancelled, your participation in the Contingent Commission Program is automatically terminated, and no Contingent Commission will be paid for the Contingent Commission period during which notice of the termination occurs. Payment of the Contingent Commission will be made on or about March 1 of the year following the Contingent Commission period.

Growth Bonus:
After you have completed one full calendar year with us, you become eligible for the Growth Bonus in the following Contingent Commission period. You may earn the additional Contingent Commission Growth Bonus when your annual written premium volume for the current Contingent Commission period exceeds the written premium for the previous period by at least 15%. This growth must be achieved through new business to us, and not from the purchase or acquisition of existing business written with us from another agency. The amount of the bonus will be an additional 10% of your Contingent Commission including any Advantage Agent Bonus you may qualify for (see Addendum C).

Date of Agreement January 1, 1996 By _____ Vice-President In behalf of

INSURANCE DESIGNERS
Agency Name

By _____
Name

PRES 8/21/95
Title Date

Witness _____

Farmers Alliance Mutual Insurance Company ☒
Alliance Insurance Company, Inc. ☒
Alliance Indemnity Company ☐

INDEMNIFYING AGREEMENT

If the agency is a corporation, you as an individual and an officer of the corporation, guarantee the faithful performance of the corporation and to pay any sum which the corporation may become liable to pay us.

Signature of Two Officers

_____

_____

Dated at _____

_____, 19 ____

Witness _____

Form No. MK-64
(Rev. 6-95)